S. Hrg. 98-450

AIR TRAVELERS SECURITY ACT OF 1983

HEARING

BEFORE THE

SUBCOMMITTEE ON AVIATION

OF THE

COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

UNITED STATES SENATE

NINETY-EIGHTH CONGRESS

FIRST SESSION

ON

S. 764

TO ASSURE THE CONTINUED PROTECTION OF THE TRAVELING PUBLIC IN THE MARKETING OF AIR TRANSPORTATION, AND FOR OTHER PURPOSES

OCTOBER 4, 1983

Serial No. 98-42

Printed for the use of the
Committee on Commerce, Science, and Transportation

U.S. GOVERNMENT PRINTING OFFICE
27-391 O
WASHINGTON : 1984

5261-7

COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

BOB PACKWOOD, Oregon, *Chairman*

BARRY GOLDWATER, Arizona
JOHN C. DANFORTH, Missouri
NANCY LANDON KASSEBAUM, Kansas
LARRY PRESSLER, South Dakota
SLADE GORTON, Washington
TED STEVENS, Alaska
BOB KASTEN, Wisconsin
PAUL S. TRIBLE, Jr., Virginia

ERNEST F. HOLLINGS, South Carolina
RUSSELL B. LONG, Louisiana
DANIEL K. INOUYE, Hawaii
WENDELL H. FORD, Kentucky
DONALD W. RIEGLE, Jr., Michigan
J. JAMES EXON, Nebraska
HOWELL HEFLIN, Alabama
FRANK R. LAUTENBERG, New Jersey

Gerald J. Kovach, *Chief Counsel*
Ralph B. Everett, *Minority Chief Counsel*

Subcommittee on Aviation

NANCY LANDON KASSEBAUM, Kansas, *Chairman*

BARRY GOLDWATER, Arizona
JOHN C. DANFORTH, Missouri
TED STEVENS, Alaska
PAUL S. TRIBLE, Jr., Virginia

J. JAMES EXON, Nebraska
DANIEL K. INOUYE, Hawaii
WENDELL H. FORD, Kentucky
FRANK R. LAUTENBERG, New Jersey

CONTENTS

Page
Opening statement by Senator Kassebaum 1
Opening statement by Senator Hollings 1
Opening statement by Senator Exon 20
Opening statement by Senator Pressler 21
Text of S. 764 2

LIST OF WITNESSES

Anderson, Hon. Glenn M., U.S. Representative from California 17
DeMuth, Christopher, Administrator, Office of Information and Regulatory Affairs, OMB; and William F. Baxter, Assistant Attorney General, Antitrust Division, Department of Justice 118
  Prepared statement of Mr. DeMuth 121
  Prepared statement of Mr. Baxter 124
Linen, Jonathan, S., president, travel division, American Express Co.; and James Gaffigan, executive director, Travel and Tourism Government Affairs Council 131
  Prepared statement of Mr. Linen 133
  Answer to question of Senator Inouye 135
  Prepared statement of Mr. Gaffigan 136
Macchia, Arlene, president, National Passenger Traffic Association, Inc., accompanied by John Bacon, Tenneco; Tim Gaines, Lockheed Corp., and Richard Stein, counsel; Cornish Hitchcock, Aviation Consumer Action Project; and Willard Brown, vice president, Travel Agency Services, American Automobile Association 139
  Prepared statement of Ms. Macchia 141
  Prepared statement of Mr. Hitchcock 157
  Prepared statement of Mr. Brown 162
McKinnon, Hon. Dan, Chairman, Civil Aeronautics Board; Frank Willis, Deputy Assistant Secretary for Policy and International Affairs, Department of Transportation, accompanied by Susan McDermott, Office of General Counsel; Richard Knodt, president, American Society of Travel Agents, accompanied by Paul M. Ruden, counsel; Gabriel Phillips, senior vice president of traffic services, Air Transport Association of America; Ronald A. Santana, president, Association of Retail Travel Agents, accompanied by Barry Roberts, counsel; and John D'A. Meredith, on behalf of the International Air Transport Association, accompanied by Burt Ryan, counsel 23
  Prepared statement of Mr. McKinnon 25
  Answers to questions of Senator Inouye 52
  Prepared statement of Mr. Willis 55
  Prepared statement of Mr. Knodt 58
  Answers to questions of Senator Inouye 77
  Prepared statement of Mr. Phillips 79
  Prepared statement of Mr. Santana 86
  Prepared statement of Mr. Meredith 94
Warner, Hon. John, U.S. Senator from Virginia 3
  Prepared statement 4

ADDITIONAL ARTICLES, LETTERS, AND STATEMENTS

Aerospace Industries Association of America, Inc., statement 175
Getty Oil Co., statement 174
Hulett, William, president, Stouffer Hotels, statement 175
Luken, Hon. Thomas A., U.S. Representative from Ohio, statement 172
Pepper, Hon. Claude D., U.S. Representative from Florida, statement 171
Santini, James D., Washington representative, National Tour Association, statement 173

AIR TRAVELERS SECURITY ACT OF 1983

TUESDAY, OCTOBER 4, 1983

U.S. SENATE,
COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION,
SUBCOMMITTEE ON AVIATION,
Washington, D.C.

The subcommittee met, pursuant to notice, at 9:35 a.m., in room 253, Russell Senate Office Building, Hon. Nancy Kassebaum (chairman of the subcommittee) presiding.

Staff members assigned to this hearing: Chuck Doyle, staff counsel, and Steve Palmer, minority professional staff member.

OPENING STATEMENT BY SENATOR KASSEBAUM

Senator KASSEBAUM. The hearing will come to order. I welcome everyone this morning and would like to express appreciation to those who are testifying.

The purpose of this hearing is to examine the CAB's decision in the competitive marketing investigation. Senator Warner and Congressman Anderson, who I am pleased to have with us this morning as leadoff witnesses, have introduced S. 764 and H.R. 2053, the Air Travelers Security Act, in response to the CMI decision.

We will be looking at this legislation as it relates to the travel agency industry and the Board's decision. I think we can all agree that travel agents serve a very valuable function, and I want to make sure that we are not going to destroy that system. At the same time, competition can stimulate new and innovative ideas that will eventually inure to the consumer's benefit.

I would like to point out that there are a large number of witnesses this morning and I would urge all witnesses to very briefly summarize their testimony. The full statements of course will be a matter of record. I have a statement from Senator Hollings that I will insert in the record.

[The statement and bill follow:]

OPENING STATEMENT BY SENATOR HOLLINGS

As everyone knows, these are not good times for the airline industry. On the heels of three straight years of record losses, which have totalled well over $1 billion, the nation's eighth largest airline has recently filed for bankruptcy, with another major carrier teetering on the brink of a similar fate.

Many will argue that the culprit of this crisis is the depressed economy, which suppresses demand for travel and thus encourages the kind of fare wars we have seen on many major domestic routes. In my opinion, however, the major reason we are facing this desperate situation is airline deregulation. U.S. airlines suffered through numerous recessions as a regulated industry without incurring the kind of financial and employment losses that we have seen in recent years.

In its fervor to deregulate everything in the airline industry, the Civil Aeronautics Board last year issued its landmark decision on the "Investigation into the Competitive Marketing of Air Transportation." This decision, known simply as the CMI decision, was an unsolicited administrative effort to eliminate the exclusive right of travel agents to market airline tickets, along with the antitrust immunity that has encouraged industry-wide marketing agreements.

The question before us today is whether the CMI decision is the kind of action the Congress wanted when it enacted the Airline Deregulation Act of 1978. The nationwide system of accredited travel agents, working to serve the airlines, has been in place for almost 40 years. Through gradual evolution, this arrangement has become a highly efficient operation that provides air travelers with secure access to both domestic and foreign flights with relative ease.

The CMI decision will likely lead to a significant change in the marketing of airline tickets in this country. Many believe that this change is undesirable, and have advocated enactment of S. 764, The Air Travelers Security Act, which would vacate the CMI decision and impose an earlier decision made by an Administrative Law Judge. This hearing will hopefully address the need for this legislation, as well as explore the long-term effect of such action.

I am hopeful that this hearing will help address some of these questions, as well as the need for legislation in this area. For this reason, I commend the Aviation Subcommittee for scheduling this hearing and look forward to working with Chairman Kassebaum, Senator Exon, and other members of the Subcommittee on this important issue.

[S. 764, 98th Cong., 1st sess.]

A BILL To assure the continued protection of the traveling public in the marketing of air transportation, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Federal Aviation Act of 1958 (49 U.S.C. 1301 et seq.) is amended by adding the following new sections at the end of title IV thereof:

"CONGRESSIONAL DECLARATION OF POLICY

"SEC. 420. The Congress hereby finds and declares—

that the maintenance of competency, honesty and efficiency in the marketing and sale of passenger air transportation is an important feature of the national integrated air transportation system which must be encouraged and preserved for the benefit of the traveling public;

that mutual acceptance by air carriers and foreign air carriers of persons engaged as sales agents in the marketing and sale of passenger air transportation is necessary to maintain a nationwide network of qualified sales agents and requires cooperation among such carriers;

that the national interest in air travel, consumer welfare, tourism promotion, professionalism and financial stability in the marketing and sale of passenger air transportation requires continuation of carrier cooperative working arrangements as to assure that such goals are met; and

that it is in the public interest that carrier cooperative working arrangements for the marketing of passenger air transportation be subject to continuing administrative oversight with respect to compliance with the antitrust laws.

"SEC. 421. The Board is directed to vacate Order 82-12-85, adopted December 16, 1982, and to adopt as its final decision in Docket 36595 the Recommended Order accompanying the Initial Decision of the Administrative Law Judge therein, dated June 1, 1982.".

Senator **KASSEBAUM**. Before the first witnesses are called, I would just like to explain that following Senator Warner and Congressman Anderson, the format will be one of debate, which I would like to try. I have used it on occasion because I think some of the times here in our hearings they tend to get a little bit dull and it really enhances, I think, an understanding of the issue if both sides can be discussing with each other, as well as us, some of the intricacies of the problems.

Senator **Exon**. Madam Chairman, if you would yield, you don't mean that the Senators are dull; it is the witnesses that are dull.

Senator **Kassebaum**. Well, I think we can all share equally at times the blame.

It is a great pleasure to welcome back to the Commerce Committee a former member, Senator Warner. If you would begin please.

STATEMENT OF HON. JOHN WARNER, U.S. SENATOR FROM VIRGINIA

Senator **Warner**. Thank you very much, Madam Chairman and members of the committee, I am pleased to appear before the committee with my distinguished colleague from the House, Glenn Anderson. I will take to heart the chairman's admonition to be very brief. Therefore, I will summarize my statement with the understanding of course that my entire statement is made a part of the record.

I would like to observe with great pleasure the bipartisan support given this bill by the committee. A majority of the subcommittee as well as a majority of the full Commerce Committee are cosponsors of this bill.

Madam Chairman, despite all the years of hearings and all the volumes of testimony, all the hundreds of hours of serious deliberation expended by the travel industry, by the Federal Government and by Members of Congress on this issue, the question here is really a very simple one.

Will there be unfettered competition and will consumers continue to enjoy the rights and conveniences they have come to expect in the air travel accommodation marketplace? The decision to be made is quite clear cut.

If the position outlined in the Air Travel Security Act is adopted, the answer in my judgment is unquestionably "yes." If the position outlined in the Civil Aeronautics Board's conclusion of the competitive marketing investigation [CMI] is adopted, the answer is resoundingly "no."

Under the bill put forth by my distinguished colleague, Glenn Anderson, 150 representatives, 37 Senators, and me, International Air Traffic Association, IATA, and the Air Traffic Conference [ATC] accredited travel agents would be allowed to continue as they have for some 40 years serving the public in a universal manner, while the barriers established by the CAB, which previously barred others from participating in the travel marketplace, would be stripped away, enabling these new enterprises to take their place in an unregulated environment.

This bill represents an interest which is bigger than the airlines. It is bigger than 22,000 independent highly competitive travel agents across the United States, 95 percent of which are small businesses, 46 percent of which are owned by women, 12 percent of which are owned by minorities, and which employ some 135,000 people, 70 percent of whom are women.

This bill represents an interest which is as big as the entire national and international travel and tourism industry and all the millions of people it serves annually. Incidentally, the travel and tourism industry is represented here today by the Travel and Tourism Governmental Affairs Council. Attached to my formal statement is a list of other industry members who support this bill.

In the end, we as members of the Senate, as representatives of the American public, must ask ourselves how do we best secure the rights, the choices and the convenience of those who travel? Do we do it by imposing on the travel marketplace a set of arbitrary standards to be administered by the courts? Or do we do it by destroying the unnecessary barriers to competition and allowing the market to regulate itself through free enterprise? I think the latter is the better choice.

It occurred to me, as we all studied the problems brought on in the last few weeks in the airline industry, that I think our bill would enable those persons inconvenienced by Continental to get other accommodations quickly. But if the CAB's position had been in effect, in all likelihood travelers would have been frustrated in trying to get alternative modes of travel.

Furthermore, I think that our bill presents a more cost-effective way to do business at the very time when this industry is struggling with heavy overhead costs.

I thank the chairman and members of the committee and I now defer to my colleague.

[The statement follows:]

STATEMENT OF HON. JOHN W. WARNER, U.S. SENATOR FROM VIRGINIA

Madam Chairman, I am gratified by the opportunity to appear before your subcommittee testifying in behalf of the Air Travelers Security Act of 1983.

Most especially, I am gratified by the tremendous outpouring of bipartisan support given this bill by a majority of this subcommittee, as well as a majority of the members of the Senate Commerce Committee.

In my first two years in the Senate, Madam Chairman, you and I worked together here on this committee. Over the years, you and I have joined forces on a broad range of issues. Particularly in the area of travel and tourism, we have worked closely, and always I have been impressed by your sensitivity to the needs of travelers throughout our land and abroad.

As with those efforts, I know your overriding concern with this issue is to adopt that solution which meets the needs and secures the rights of the air traveler.

To that end, I commend you on the format and time commitment you have provided for this very important pro-competition, pro-deregulation, consumer rights legislation, the Air Travelers Security Act.

Madam Chairman, despite all of the years of hearings, all the volumes of testimony, all the hundreds of hours of serious deliberation expended by the travel industry, by the federal government, and by members of Congress on this matter, the issue here is really a very simple one, and the decision to be made is quite clear cut.

The issue is: Will there be unfettered competition and will consumers continue to enjoy the rights and conveniences they have come to expect in the air travel accommodation marketplace?

If the position outlined in the Air Travelers Security Act is adopted, the answer in unquestionably "Yes".

If the position outlined in the Civil Aeronautics Board's (CAB) conclusion to the Competitive Marketing Investigation (CMI) is adopted, the answer is resoundingly "No".

Under the bill put forth by Congressman Glenn Anderson, 147 Representatives, 37 Senators and myself, International Air Traffic Association (IATA) and Air Traffic Conference (ATC) accredited travel agents would be allowed to continue serving the public in a ubiquitous manner while the barriers established by the CAB which previously barred others from participating in the travel marketplace would be stripped away, enabling these new entreprenuers to take their place in an unregulated environment.

Under the CAB's position, however, the ubiquitous, accredited travel agent would be regulated into obscurity by the courts and the burden of antitrust litigation.

The marketplace would be chaotically filled with hucksters and fast-buck artists willing to, literally and figuratively, take every traveler for a ride.

The scope of marketing alternatives truly available to the traveler would be greatly limited.

And many of the rights and conveniences which the public has come to expect, and which are protected by ATC administered agreements among the airlines, would be lost.

As you know, these agreements, made possible by the antitrust immunity granted the ATC:

Provide a centralized process for accreditation and appointment of travel agents;

Provide for the recognition of common ticket stock by all airlines;

Govern the acceptance by one airline of another's ticketed passenger and their baggage;

And provide for the crediting to each airline the receipts of tickets sold for each airline by their accredited agents.

In short, Madam Chairman, if the CAB's decision is allowed to stand competition and consumer rights in the marketplace will be only a figment of a former CAB chairman's imagination.

Since the beginning of the CMI in 1980, two items have surfaced as the focus of debate, They are:

(1) Antitrust immunity; and

(2) So-called "exclusivity."

As part of my written statement for the record I am submitting a memorandum detailing my views on the antitrust issues in this debate.

I also am submitting a series of tables reflecting those elements of the ATC/IATA agreements which are provided antitrust immunity under the Air Travelers Security Act and those which are not covered.

With regard to exclusivity, the Air Travelers Security Act eliminates all regulatory barriers which previously prevented carriers from utilizing businesses other than accredited travel agencies for ticket sales and distribution.

There is one exception to this statement, however. That is the secondary marketer or indirect air carrier.

On this matter, the CAB determined, in the course of the CMI, to abandon its creation for reasons I hope the CAB will enumerate at some point in this hearing. My formal written testimony provides more detail on this issue.

Madam Chairman, there are some who believe our bill is an obstacle to competition.

They are principally business travel department managers (BTD) who stated during the CMI that their only interest was in being able to generate income for their corporations, not in becoming travel agents.

Under our bill, and indeed under the present regulatory environment, these BTD's may legally purchase tickets directly from the carriers for internal distribution to company employees without going through travel agents.

More importantly, while carriers do not pay commissions on such transactions because the BTD's are purchasers or consumers of air travel, and not sellers or promoters, the carriers are free to grant these BTD's substantial discounts and liberal credit terms and, in fact, they do.

Furthermore, these discounts and terms are not available to either the general public or to travel agencies.

Some have suggested that the accredited agency system restricts the rights of travel marketing entities other than accredited agencies to sell and distribute tickets for compensation.

There are no such barriers presently, and there are none in the Air Travelers Security Act.

The current system permits carrier compensation to non-agency travel consultants for tickets sales.

This type of activity can be carried out by companies selling and distributing tickets through either machines placed on non-agency premises or through personnel employed by businesses located on such non-agency premises.

Further, the bill recognizes that other non-travel type companies such as department stores, banks, etc. could become accredited travel agencies with very little difficulty, and are therefore free to enter conference programs whenever they wish, provided they are not limited by regulations of other government agencies.

In short, nothing in the accredited agency systems or in the bill under consideration today precludes businesses other than accredited travel agencies from selling and distributing tickets for compensation, either in the form of purchaser discounts or in the form of commissions.

Furthermore, those businesses which adhere to rules against self-dealing are free to become accredited agencies even if the principal function is not travel sales and service.

Madam Chairman, this bill represents an interest which is bigger than the airlines.

It's bigger than the 22,000 independent, highly competitive travel agents across the United States;

95 percent of which are small businesses;

46 percent of which are owned by women;

12 percent of which are owned by minorities; and

Which employ over 135,000 people, 70 percent of whom are women.

This bill represents an interest which is as big as the entire national and international travel and tourism industry and all the millions of people it serves annually.

Incidentally, the travel and tourism industry is represented here today by the Travel and Tourism Governmental Affairs Policy Council.

In the end, we as Senators . . . as representatives of the American public . . . must ask ourselves:

"How do we best secure the rights, the choices and the conveniences of those who travel?"

"Do we do it by imposing on the travel marketplace a set of arbitrary standards to be administered by the courts?"

"Or do we do it by destroying the unnecessary barriers to competition and allowing the market to regulate itself through the free enterprise of ATC and IATA accredited full service travel agencies; bulk discounters; charteers; automated point-to-point ticketing outlets; and an infinite variety of other alternatives?"

Madam Chairman, I think the choice is very clear, and that's why I enthusiastically support and seek passage of the Air Travelers Security Act of 1983.

[Memorandum]

THE AIR TRAVELERS SECURITY ACT OF 1983

THE ANTITRUST IMMUNITY ISSUE

This Memorandum addresses the antitrust considerations in the Air Travelers Security Act of 1983, S. 764 and H.R. 2053. The principal controversy arising from this legislation involves the question of whether the current system of collective agreements between air carriers and travel agencies should retain antitrust immunity, which the Civil Aeronautics Board has decided to remove by the end of 1984 when the CAB goes out of existence. This legislation would restore immunity and essentially leave intact the current system, which most observers believe works extremely well. If the agreements lose immunity, however, it is likely that the agency-carrier system will no longer remain in effect because the agreements rely upon close cooperation among competing businesses not generally permitted under U.S. antitrust laws.

I. BACKGROUND AND SUMMARY

The United States has long been one of the most problem free countries in the world for air travel because of its system of collective agreements between air carriers and travel agencies approved by the CAB. Congress, in its enactment of the Airline Deregulation Act of 1978 and the subsequent enactment of the International Air Transportation Competition Act of 1979, found no basis for altering this system. The CAB nonetheless determined a need to study the competitive effects of the agreements, which provide for the sale and distribution of airline tickets through travel agencies accredited pursuant to standards set by both the Air Traffic Conference (ATC), a division of the Air Transport Association (ATA), consisting of all U.S. carriers; and by the International Air Transport Association (IATA), consisting of almost all non-U.S. carriers.

The CAB assigned one of its most experienced Administrative Law Judges, Ronnie Yoder, to conduct the Competitive Marketing Investigation, which lasted more than three years. After hearing testimony and assessing evidence submitted by the numerous interested parties, Judge Yoder found that the current system of ticket sales and distribution through accredited travel agencies has no viable alternative for serving the travel consumer. He also concluded that except for removal of certain anticompetitive provisions in the agreements to permit entities such as Ticketron to sell tickets, the system should be left intact. Judge Yoder determined, however, that the agency-carrier agreements system could remain in effect only if it continues to receive antitrust immunity. He found that the current system actually increases competition by making the sale and distribution of tickets extremely efficient and by providing easy access into the market for new agencies and new carriers alike.

In December 1982, a sharply-divided CAB rejected Judge Yoder's more significant findings and conclusions and stripped protection from the agreements and agency accreditation by removing antitrust immunity when the CAB ceases to exist at the end of 1984. A large bipartisan group of Senators and Representatives from all over the United States, led by Members of Congress particularly knowledgeable about the U.S. travel, tourism and airline industries, is co-sponsoring the Air Travelers Security Act to replace the CAB ruling with Judge Yoder's findings and conclusions.

Supporting this legislation are virtually all sectors of the U.S. travel, tourism and airline industries, as well as all foreign carriers serving the U.S. These industries benefit substantially from the agency-carrier system, which facilitates air travel within, to and from the U.S. by providing for a nationwide network of some 22,000 accredited travel agencies which market air travel under a set of common rules and standards. The industry groups believe that the agency-carrier system may not survive absent antitrust immunity, and without the agency-carrier system, air travel will be far more complicated and ultimately more expensive for the travel consumer, to the detriment of these industries.

Opposed to this legislation is the CAB, which has determined that the agency-carrier system does not need antitrust immunity to continue and takes the position that in a deregulated environment, exposure to antitrust liability is a normal and acceptable business risk. The only industry opponent is the National Passenger Traffic Association (NPTA), a group composed of large company in-house travel executives who wish to gain the same benefits as accredited travel agencies without meeting the agency-carrier accreditation standards.

II. THE NEED FOR NATIONWIDE, INDUSTRY-WIDE COLLECTIVE AGREEMENTS IN THE AIR TRAVEL INDUSTRY

The air travel industry is unique in that it requires close cooperation among competitors to serve the travel consumer. The current agency-carrier system depends upon the ability of competing businesses to agree with one another on the rules and standards for efficient ticket sale and distribution. No single domestic or foreign carrier serves all points, nor will this ever be a realistic possibility. Carriers must therefore cooperate with one another to assure that the travel consumer can utilize various carrier combinations to travel in an efficient and cost-effective manner. Congress recognized the importance of intercarrier agreements when it passed the Airline Deregulation Act, finding such agreements "essential to the maintenance of a modern and convenient air transportation system, including those regarding uniform procedures for ticketing, interlining baggage, the recognition of tickets issued by one carrier for transportation on another."[1] There can be no viable national air transportation system absent the ability of carriers to work closely with one another.

Carrier interdependence requires common rules and standards to govern ticket sale and distribution in order to avoid consumer and industry confusion. The marketplace has developed the agency-carrier system as the best means of satisfying this objective. Judge Yoder accurately described this system when he found:

"These agreements provide a uniquely integrated marketing system based upon the ubiquitous presence of the industry travel agents which represent all carriers and enjoy the confidence of the public and carriers alike in their competence and reliability because of commonly administered accreditation standards. The system enabled by those agreement . . . undergirds and enables the current system of interlining and interchangeability and refundability of tickets."[2]

The intercarrier agreements essential to national air transportation thus require a set of mutually agreed upon standards to function effectively.

One cannot underestimate the importance of the travel agency-air carrier agreements to the U.S. transportation system. These agreements permit carriers to do business through one nationwide network of sales agents working under common rules and standards. This in turn assures each carrier that tickets received from its competitors on interconnecting flights can be safely honored without causing problems for the travel consumer. Judge Yoder observed:

---

[1] S. Rep. No. 631, 95th Cong., 2d Sess. 81 (1978).

[2] Competitive Marketing Investigation, Administrative Law Judge Ronnie Yoder Decision at 20 (June 1982) [hereinafter cited as Yoder Decision].

"The present system of interline sales is acceptable to carriers because they have joint control over all travel agents, even those of other carriers, under the agreements between carriers that they will permit travel agent sales only by conference accredited agreement."[3]

Without mutually agreed upon standards to govern agency-carrier relationships, there would be no means by which travel agencies could uniformly serve all carriers and by which carriers could recognize each other's agents to serve the common travel consumer. Furthermore, reliable information about all available fares and schedules, increasingly difficult to obtain in the aftermath of airline deregulation, would be unavailable to the consumer for making an informed choice best suited to individual travel needs.

Unlike other nationwide, industry-wide collective agreements, the agency-carrier system promotes competition among its participants. The CAB conceded this point in its Competitive Marketing Decision by noting that "under a common system there are far more distribution locations providing information on fares and services to the public. Because there are more outlets, offering information on a wider variety of fares and services, competition among air carriers is enhanced."[4] The agency-carrier system is the only one capable of providing so many sales outlets for carrier and consumer alike which offer uniformly high and consistent levels of service.

III. THE INHERENT CLASH BETWEEN THE AGENCY-CARRIER AGREEMENTS AND FEDERAL ANTITRUST LAW

No one, including the CAB, questions the substantial benefits provided to the consumer and industry by the agency-carrier system. Without the ability to agree collecting on reasonable rules and standards for ticket sale and distribution, however, carriers and agencies can no longer provide these benefits. If immunity is lost, application of federal antitrust laws could create insuperable obstacles to continuation of the agency-carrier agreements, which are based upon close competitor cooperation. This is readily seen by subjecting the key provisions of these agreements to traditional antitrust analysis.

A. Applicable legal standards

The agency-carrier agreements are subject to section 1 of the Sherman Act,[5] which prohibits any contract, combination or conspiracy in restraint of trade and imposes criminal liability for violations. Section 4 of the Clayton Act [6] subjects antitrust violators to civil liability for treble damages and reasonable attorneys' fees. A court confronted with a suit challenging the collective agreements must decide whether to subject them to a per se or Rule of Reason treatment. The Supreme Court has determined:

"[T]here are certain agreements or practices which . . . are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their uses. This principle of per se unreasonableness not only makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation. . . —an inquiry so often wholly fruitless when undertaken." [7]

In other words, certain practices are presumed to be antitrust violations because of their effects upon competition. These include various forms of price-fixing; group boycotts; and concerted refusals to deal.[8] A court would invalidate any of these practices found to exist in the agency-carrier system without undertaking the complex antitrust economic analysis which normally characterizes Sherman Act cases.

Conduct not subject to per se treatment is scrutinized according to Rule of Reason criteria developed over the years in a series of judicial decisions. Under the Rule of Reason analysis—

"The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied;

---

[3] Id. at 6.

[4] Competitive Marketing Investigation, Civil Aeronautics Board Decision at 36 (December 1982) [hereinafter cited as CAB Decision].

[5] 15 U.S.C. § 1.

[6] 15 U.S.C. § 15.

[7] *Northern Pacific Ry. Co.* v. *United States,* 356 U.S. 1, 5 (1958).

[8] 2 J. Von Kalinowski, "Antitrust Laws and Trade Regulations," § 6.02[2] (1982).

its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable."[9]

The Supreme Court has noted that it is only after the courts have had considerable experience with certain business relationships that conduct should be classified as per se illegal. In the absence of such experience, the challenged conduct would be subject to Rule of Reason analysis to determine whether the challenged conduct promotes or suppresses competition.[10]

This has the effect of prolonging litigation since courts will thoroughly study the affected industry and the anti-competitive effects of the challenged conduct. Absent settlement, resolution of the dispute will turn upon evidentiary considerations formulated through extensive discovery. It is perhaps significant that a CAB majority decided to remove antitrust immunity from the agency-carrier agreements principally on the theory that such litigation would be "frivolous" and of the type that all businesses should be able to defend. Litigation subjecting the agency-carrier agreements to a Rule of Reason analysis will probably not be frivolous, and it may not be affordable when the costs of mounting a defense and the risk of losing are calculated. The airlines are not in particularly strong financial condition to absorb such costs and travel agencies, which are primarily small businesses, seem particularly ill-suited as co-defendants in massive, complex antitrust litigation.

Although the agency-carrier agreements have received approval in the past, there can be no assurance that they will withstand per se scrutiny in the courts despite the fact that both Judge Yoder and the CAB concluded in the Competitive Marketing Investigation that the agreements should be analyzed by them for anticompetitive effect under Rule of Reason criteria. The Department of Justice argued throughout the investigation that the agreements are per se illegal which proves that litigation challenging them would be neither frivolous nor fanciful. The viability of a legal challenge to the agreements as per se or Rule of Reason violations or both creates the inevitable prospect of protracted and costly litigation, which in itself provides a strong disincentive for continuation of the agreements. Added to these costs is the risk that a jury or court will conclude that a violation exists.

B. Potential illegality of industry-wide accreditation standards

The agency-carrier agreements provide for common accreditation wherein carriers jointly set standards for selection and retention of travel agencies. These fall into several categories. Financial requirements for an agency include either bondability (ATC) or minimum capitalization (IATA). Honesty standards preclude accreditation in case of false statements on agency applications and felony convictions; bankruptcy (ATC); or prior accreditation suspension. Personnel requirements are imposed on both the agency manager, who must work full time and have agency experience; and upon the agency itself, which must employ at least one experienced person on the premises. Agency location requirements include rules related to limits on non-travel activities; public accessiblity; and ticket security facilities. Accreditation standards preclude agencies from self-dealing in air transportation by limiting internal agency ticket use and by barring commission payments on tickets purchased for internal agency use. Only those agencies complying with these standards can become accredited.

The above standards are not unreasonable. Because they are set collectively by competitors, however, they are subject to stringent antitrust scrutiny absent immunity. The Supreme Court, in the recent *Hydrolevel* case, has expanded the liability of businesses which promulgate industry-wide standards of conduct actually applied even if the standards are doing business with industry members.[11] The setting of standards to govern the sale and distribution of airline tickets through collective appointments and accreditation subjects both U.S. and foreign carriers to potential antitrust liability whenever a carrier refuses to permit its tickets to be sold by agencies which do not meet those standards. Even though the standards might be commercially reasonable, because they are set collectively by the carriers, commercial reasonability would not be a defense to liability if a court concludes that use of the standards fall within the per se category.

Even if adherence to such standards is voluntary, any effort by particular industry members to apply them might subject the industry to liability. Justice Powell, dissenting against the *Hydrolevel* ruling, identified the problem likely to be faced by carriers seeking to impose standards on travel agencies, when he concluded that an industry will protect itself "by ceasing to respond to inquiries concerning its codes."[12] He then noted that "industry standard-setting can have a signficiant potential for consumer benefit" because "information can be expensive if consumers are forced to gain it only by their own experience or by the creation of another bureaucracy."[13] *Hydrolevel* involved a jury verdict and the question of whether the association could be liable for application of an industry code by individual members. The case is instructive in showing how industry standards can expose members to antitrust liability despite the efficiencies and benefits which flow from industry practices.

---

[9] *Chicago Board of Trade* v. *United States*, 246 U.S. 231, 238 (1917).

[10] *Broadcast Music, Inc.* v. *Columbia Broadcasting System*, 441 U.S. 1, 9–10 (1979); *National Society of Professional Engineers* v. *United States*, 435 U.S. 679, 691 (1978).

[11] *American Society of Mechanical Engineers* v. *Hydrolevel Corp.*, 102 S. Ct. 1935 (1982). See also *American Column & Lumber Co.* v. *United States*, 257 U.S. 377 (1921).

The recent *National Association of Broadcasters* case reinforces the likelihood that standards imposed as a condition of doing business within a given industry are incompatible with U.S. antitrust laws.[14] Judge Harold Greene, one of the nation's most prominent antitrust judges, struck down the advertising code imposed by broadcasters even though adoption of the code was voluntary. Because broadcasters deciding to adopt the code were contractually obligated to honor it, however, Judge Greene concluded that the comprehensive monitoring and enforcement program to maintain code compliance among subscribers made the standards obligatory rather than voluntary and invalidated them as an antitrust violation. Even though the CAB has made adherence to the ATC and IATA standards voluntary after 1984, it is doubtful that such standards can lawfully exist if they are imposed collectively by the carriers. Without standards for accreditation, there does not seem to be any reason for the agency-carrier programs to continue.

C. *The area settlement plan*

The current agency-carrier system provides for an extremely efficient mechanism to settle accounts, the Area Settlement Plan (ASP), which establishes a system of weekly standardized reporting and remission of ticket sale proceeds through a system of area banks located throughout the U.S. The area banks in turn draw upon an agency's commercial bank for the amount owed each carrier. The ASP also monitors agency performance of payment obligations and provides for both fines and eventual accreditation suspension for repeated agency delinquency. Adherence to the ASP has been voluntary since the CAB disapproved provisions which made ASP participation a condition for agency accreditation several years ago. Although agencies now have the right to negotiate individual credit and payment terms with each carrier, carriers have generally been unwilling to do this because the ASP works so efficiently and assures them prompt payment.

The ASP is vulnerable to antitrust attack when immunity is removed because of the holding in the 1980 *Catalano* case,[15] which invalidated as illegal per se price-fixing an agreement among wholesalers to deny credit to their customers. This case could preclude future carrier reliance on the ASP as the sole means of payment when immunity expires, since the ASP does not permit the individual buyer-seller negotiation of terms which characterizes the free market model contemplated by U.S. antitrust laws. The CAB found the ASP distinct from the practice in *Catalano* by treating airline ticket proceeds as funds held in trust for the carriers by the agents, and the CAB also pointed to voluntary participation in ASP as a means of distinguishing it from the *Catalano* situation. As seen in *National Broadcasters* and *Hydrolevel,* however, voluntary participation in a standards-setting agreement does not remove the participants from federal antitrust scrutiny, and the trust theory is somewhat subject to attack. There is judicial authority to support an argument that horizontal agreements which result in market efficiencies and corresponding lower prices to the consumer may not constitute per se antitrust violations, and under Rule of Reason analysis the ASP seems to be an acceptable practice.[16] It would appear, however, that *Catalano, Hydrolevel* and *National Broadcasters* make the ASP vulnerable to attack and this vulnerability might reasonably chill the willingness of the carriers to continue participation in it since other provisions of the agency-carrier system are also subject to challenge.

D. *Exclusivity*

Current agency-carrier agreements provide that only those agencies which meet all conference accreditation requirements are authorized to sell tickets. The CAB has invalidated this provision, effective January 1, 1985, while Judge Yoder's conclusion that exclusivity is essential for maintaining the present agency-carrier system would be incorporated into U.S. law if Congress enacts the proposed legislation. Absent immunity, exclusivity would be particularly susceptible to antitrust attack and those carriers which choose to engage in de facto exclusivity do so at substantial legal risk. In the *Radiant Burners* case,[17] the Supreme Court ruled that sellers in a given industry which agree not to deal with a buyer who fails to conform to industry standards set by the sellers can be subject to per sé antitrust liability. This rule could effectively bar enforcement of industry-wide standards for travel agencies by contractual prohibitions against individual carrier transactions with agencies failing to comply with ATC or IATA standards.

---

[12] *Hydrolevel,* 102 S. Ct. at 1956 (Powell, J., dissenting).

[13] Id. at 1957.

[14] *United States* v. *National Association of Broadcasters,* 536 F. Supp. 149 (D.D.C. 1982).

[15] *Catalano. Inc.* v. *Target Sales, Inc.,* 446 U.S. 643 (1980).

[16] *Broadcast Music,* supra note 10.

The CAB found that the exclusivity provisions violate federal antitrust law absent immunity despite all the consumer benefits they offer.[18] Judge Yoder concluded that exclusivity is necessary for retention of the interline agreements because of carrier need to set uniform rules and standards for ticket sale and distribution, which would be meaningless if there were no means of enforcing them.[19] Both Judge Yoder and the CAB are probably correct, which illustrates the inherent conflict between antitrust laws and the need for immunity to retain the highly beneficial agency-carrier system.

Assuming that absent immunity, carriers may not collectively refuse to deal with agencies which fail to meet accreditation standards, single carriers deciding to deal only with accredited agencies fare little better under existing antitrust law. A single supplier normally has the right to select or reject customers, but courts applying the Sherman Act have qualified this right with certain restrictions particularly applicable to the agency-carrier system. For example, the Supreme Court has declared that a supplier may not impose anticompetitive ancillary agreements upon a prospective customer as a condition of sale.[20]

Assuming arguendo that the ASP or accreditation programs are anticompetitive, it is doubtful that an individual carrier can lawfully compel a travel agency to participate in these programs as a condition for selling tickets. If federal antitrust law precludes these conditions, then the agency-carrier programs have little meaning. This becomes even more apparent by the antitrust prohibition against supplier employment of a third party to enforce restrictive practices, which, absent immunity, makes ATC and IATA enforcement of the agency programs at the request of a member carrier potentially unlawful.[21]

E. Conclusion

Little about the agency-carrier program is in harmony with existing antitrust law and absent immunity, there seems to be substantial doubt that the agreements will continue in any meaningful form. This is not surprising, since Congress has always exercised its power to grant immunity to desirable collective industry behavior to protect it from judicial sanctions.

IV. THE NEED TO IMMUNIZE THE AGENCY-CARRIER AGREEMENTS

Almost without exception, those who understand the agency-carrier system believe it should remain intact. Because the system relies so heavily upon collective agreements on common rules and standards, which are strongly disfavored by federal antitrust courts, it must receive antitrust immunity to continue. In fact, the CAB order initiating the Competitive Marketing Investigation states that "without immunity . . . it is likely that neither the IATA nor the ATC conference systems could have [ever] been developed." [22] CAB Chairman Dan McKinnon, the most prominent and vocal opponent of the Air Travelers Security Act, recognized this when he dissented against the CAB majority decision to remove immunity at the end of 1984. He wrote that "the facts show that antitrust immunity should be granted beyond 1984 for all approved conference programs so that the many public benefits of the established programs are preserved." [23]

If Congress does not restore immunity through passage of this legislation, the system will undoubtedly be subjected to costly antitrust proceedings which could last for years. The last major case involving CAB antitrust immunity issues lasted

---

[17] *Radiant Burners, Inc.* v. *People's Gas Light and Coke Co.,* 364 U.S. 656 (1961).

[18] CAB Decision at 42, especially n. 142.

[19] Yoder Decision at 86–88.

[20] *Albrecht* v. *Herald Co.,* 390 U.S. 145 (1968).

[21] *United States* v. *Parke, Davis & Co.,* 362 U.S. 291 (1960).

[22] CAB Order 79—9-64 at 2 (Sept. 13, 1979).

[23] CAB Decision (McKinnon Dissent).

12 years and involved 56,000 legal hours at a cost of $7.5 million to only one party in the dispute, prompting Chief Justice Burger to describe it as the "20th Century sequel to Bleak House." [24] Congress in fact cited the infamous Hughes-TWA litigation as the basis for much of the Airline Deregulation Act to avoid the problems and delays likely to emerge in a complex, Rule of Reason airline antitrust case. While such litigation is in progress, it is highly likely that administrative decision-making by the CAB successor agency for air passenger travel will function very poorly, since the agency will be reluctant to second-guess the court presiding over the case, and carriers will not know what conduct is illegal until the court finally decides this after all appeals are exhausted. Problems involved in naming IATA carriers as antitrust co-defendants may prove to be insurmountable, since many of them are owned by sovereign states which will not only impede discovery efforts, but also take retaliatory steps against U.S. carriers abroad. Subjection of foreign sovereign-owned enterprises to treble damage liability is a sensitive issue well known to Congress. Finally, the prospects of injunctive relief in such litigation make the spectre of judicial management of the air travel industry all too real, particularly since it has already happened with the even more complex and larger telephone industry.

The above prophesy assumes that the carriers will choose to continue participation in the agency-carrier programs and defend them from antitrust attack. In fact, however, there is ample evidence that if Congress fails to restore immunity, the carriers will withdraw their participation and dismantle the system. The extensive Competitive Marketing Investigation record indicates that "carriers would not continue to participate in the conference agreements if antitrust immunity is denied." [25] The carriers have frequently testified before Congress that this will indeed happen. Prior to the CAB decision, the ATA stated:

"The serious risk that the joint selection, retention and termination procedure of the ATC Travel Agency Program in its present form would be characterized as a per se [violation] poses an insurmountable antitrust obstacle to its continuation without continued immunity."[26]

In recent hearings, the ATA reaffirmed its position that removal of immunity will terminate the agency-carrier system:

"[W]ith the loss of antitrust immunity at the end of 1984, we doubt that the [agency-carrier] program could continue in its present form. The risk to the airlines and the cost of defending probable antitrust suits would just be too treat. . . . It is ourstudied conclusion . . . that without antitrust immunity the risks involved would be too great and the potential cost too heavy for the airlines to continue the current program."[27]

Given the carriers' own statements, and given the legal sensibility of their position based upon applicable judicial precedent, it is apparent that absent restoration of immunity to the agency-carrier system by Congress, that system will effectively cease to exist.

V. CONCLUSION

The current agency-carrier system works very well for the travel consumer and the travel, tourism and airline industries by assuring the existence of an efficient air transportation system governed by common rules and standards. Because the system consists of agreements among competitors necessary to serve a common travel consumer, and because federal antitrust law traditionally prohibits such agreements despite their attendant consumer benefits, it is reasonably certain that failure to pass this legislation and restore immunity to the agency-carrier system will be the system's undoing. If carriers decide to continue the agreements and defend them in antitrust litigation, there is no certainty whatsoever they will prevail since conduct constituting per se violations forecloses judicial scrutiny of its benefits and pro-competitive effects. If Congress fails to act, it is therefore likely that the courts will determine the nature of U.S. air travel in a manner not necessarily in the consumer or industry interest.

---

[24] *Hughes Tool Co.* v. *Trans World Airways*, 409 U.S. 363, 393 (1973) (Burger, C.J., dissenting).

[25] Yoder decision at 209.

[26] "Hearings Before the Subcomm. on Aviation of the Senate Commission on Commerce, Science and Transportation," 97th Cong., 1st Sess. 18 (1981) (Statement of Paul Ignatius, Air Transport Association).

[27] "Hearings Before Subcomm. on Antitrust and Restraint of Trade Activities Affecting Small Businesses of the House Commission on Small Business," 98th Cong., 1st Sess. 11 (1983) (Statement of Gabriel Phillips, Air Transport Association).

MARKETING RELATIONSHIPS AND ANTITRUST IMMUNITY UNDER YODER DECISION

MARKETING RELATIONSHIPS SUBJECT TO CONFERENCES

Agency relationship:

(1) Meets accreditation rules.
(2) Represents all conferences airlines.
(3) Holds out as "travel agent."
(4) Agent-at-law: binds the airlines through representations, ticket issuance, receipt of public's money on carrier's behalf.
(5) Acts as travel counsellor to public.
(6) Sells interline transportation involving conference airlines.
(7) Normally paid by commission but can take inventory risks.
(8) Settles accounts normally through Area Settlement Plan using Standard Agent Ticket Stock, but may settle outside ASP on airline stock if carrier agrees.
(9) Can Discount if individual airline allows it.

MARKETING RELATIONSHIPS OUTSIDE CONFERENCES

Non-agency ticket distributors:

(1) Negotiates own terms of relationship with any airline.
(2) Sells on an "on-line" basis only, for carriers with which it has contracted.
(3) Holds out as anything but a "travel agent."
(4) Normally takes inventory risk but can be paid commission based on sales.
(5) Can also be an accredited agent but not from same location.
(6) Uses ticket stock other than Standard Agents Ticket Stock and settles outside Area Settlement Plan on negotiated basis.
(7) Can discount if taking inventory risk or, if not, then with carrier consent.

Current examples:

(1) Contract Bulk Fare Operators (Club Med had CBF deal with American Airlines—there have been numerous others).
(2) Ticketron.

*Future examples:**

(1) HATA—reservations/translation service.
(2) ATBB—ticket delivery from bank locations.

* Both of these could have been done under the original agreements at issue in CMI—they were outside the conferences, as were CBF's and in the case of IATA, Ticketron.

SUMMARY RE SCOPE OF IMMUNITY UNDER YODER DECISION

Item	Immunized?
Conference procedures and actions	Yes.
Deviations by conferences from approved procedures	No.
Marketing relationships outside conference rules	No.
Group boycott by agents against airline to force raising of commissions or prevent reductions	No.
Group boycott by agents against airline to deter use of ticket distribution outside conference rules	No.
Price-fixing by agents	No.
Price-fixing by airlines, within or outside of ATC	No.

CONFERENCE PROCESSES

Process	Subject to review by CAB/DOT	Immunity [1]
Development/amendment of accreditation rules	Yes	Yes.
Rights of agents and third parties to make input	Yes	Yes.
Development/amendment of area settlement plan rules	Yes	Yes.
Rights of agents to make input	Yes	Yes.
Negotiation of non-ASP settlement by accredited agent	No	No.
Processing of applications to be accredited agents	Yes [2]	Yes.

[1] All approved rules and procedures must be strictly followed or immunity is lost.

[2] Only as to procedures used, but not as to individual applications, which have separate review procedures by Travel Agent Commissioner and arbitration.

RELATIONSHIPS OUTSIDE CONFERENCE

Process	Subject to review by CAB/DOT	Immunity
Negotiation of ticket distribution contract terms	No	No.
Negotiation of settlement terms	No	No.
Resolution of disputes	No	No.

CONFERENCE PROCESSES

Process	Subject by CAB/DOT[1]	Immunity[2]
Enforcement of accreditation rules—continuing compliance	Yes	Yes.
ATC action	Yes	Yes.
Travel Agent Commissioner	Yes	Yes.
Arbitration procedure	Yes	Yes.
Area settlement plan financial monitoring and enforcement	Yes	Yes.
ATC action	Yes	Yes.
Travel Agent Commissioner	Yes	Yes.
Arbitration	Yes	Yes.

[1] As to procedures; no, as to individual cases.

[2] All approved rules and procedures must be strictly followed or immunity is lost.

Note: If CAB decision stands, all actions under "Conference Processes" will be subject to attack under the Sherman Act in any Federal court by Justice Department or any private plaintiff.

[Memorandum]

"EXCLUSIVITY" AND LIMITATIONS ON ENTRY INTO THE DISTRIBUTION OF AIRLINE TICKETS

Throughout the CAB review of the ATC and IATA agency programs and the debate over the Air Traveler Security Act, critics of the programs have focused particular attention on their "exclusivity" provisions. These provisions require participating carriers to refrain from using agents who do not meet the qualification standards of the programs. The critics allege that exclusivity inequitably denies the builder of a superior distribution mousetrap an opportunity to use it and thus deprives consumers of the benefits of innovative competition. Since innovation and new entry lie at the heart of the competitive process, these allegations clearly warrant careful Congressional review.

Defenders of the agency programs point out that critics were unable to identify any specific distribution innovations which had been foreclosed by the programs. Perhaps more importantly, defenders contend that the programs themselves cannot effectively hamper innovation since they impose no limitations on sales techniques used by airline employees (e.g., use of ticketing machines or videotext in-home sales) or on sales by airlines to retailers who resell in their own names. The latter category of true retailers (i.e., non-agents selling air transportation to the public in their own behalf) are, however, legally classified as "indirect air carriers" and thus cannot do business without a CAB license or exemption. Fed. Aviation Act §§ 401, 416; see Order 82-12-85 at 50 M.170.

The CAB has been extremely reluctant to license indirect air carriers for passenger transportation. At present, indirect passenger authority is available only for charter tour operations (14 C.F.R. Part 380) which are heavily regulated and contract bulk operations (Order 80-2-112), which are subject to equally stringent conditions. As a practical matter, these authorizations are simply insufficient to permit potential retailers to develop significant operations in selling to individual passengers. See Order 82-12-85 at 39, 40.

For example, a major travel agent or motel chain might decide that the traveling public would be prepared to buy from seats on regularly scheduled flights and that they could obtain those seats at satisfactory wholesale prices and under workable inventory arrangements from major airlines. Under present legal conditions, a retail operation of this kind would not be affected by the agency programs which would leave each participating carrier free to determine whether or not to sell to the innovator. The operation would, however, be foreclosed by CAB regulation and the innovator would find that the CAB had not even promulgated regulations governing applications for relief from this legal disability.

In these circumstances, it is apparent that both CAB legal restrictions and "exclusivity" may play a role in limiting the opportunities of a theoretical distribution innovator who wishes to operate outside the boundaries of program agency qualification. "Exclusivity" produces the offsetting advantages of ensuring agent competence in the absence of regulatory control, facilitating interline acceptance of agent-written tickets and safeguarding carrier investments in consumer confidence in accredited agents. CAB limitations on indirect air carrier entry, by contrast, have no offsetting benefits.

Thus, if the "innovation" problem could be resolved by removing CAB restrictions, and subjecting the agency programs to market discipline rather than dismantling them, the interests of carriers, agents and (most important) consumers would best be served. Indeed, a solution in which retailing became the outlet for innovations not yet acceptable for agency sales where carriers are directly accountable, would parallel the Board's action in Phase V of the Competitive Marketing Investigation where it recognized that its own tariff rules, rather than the agency programs, were the cause of limited pricing flexibility at distributor level.

Since the Board has never permitted meaningful entry in indirect passenger air transportation marketing, the impact of its restrictive regime is hard to assess empirically. Useful information was, however, made available during the Competitive Marketing Investigation when the impact of "exclusivity" in the international air cargo markets was examined.

In cargo marketing, the Board has used its exemption authority to allow virtually free entry to air freight forwarders who issue their own waybills and set their own prices and conditions while purchasing cargo space on scheduled flights from air carrier parties to the IATA agency program. 14 C.F.R. Part 296. The record evidence clearly demonstrated that forwarding was a virtually equivalent substitute for agency service from the perspectives of both distributors and shippers. See Order 82-12-85 at 113-116 ("forwarder status constitutes a readily available alternative to agency status"). Thus, the Board could find no blockage to innovation in international cargo marketing despite the presence of "exclusivity." [1]

The cargo experience set forth in the record of the Competitive Marketing Investigation makes clear that the Board's disapproval of passenger agency exclusivity was premature if not totally mistaken. The Board could have used the period of the Competitive Marketing Investigation to clear its own house by authorizing indirect air carrier entry into the retailing sector. In the unlikely event that passenger retailing did not provide "a readily available alternative to agency status" the Board could exercise its continuing jurisdiction to assess the balance between "exclusivity" benefits and burdens with real knowledge of substantive barriers, if any, to innovation. Surely, the real issue for the builder of the hypothetical better mousetrap and the consumers he wishes to serve is not the form which market entry takes but the substantive ability to test innovation in the marketplace.—September 6, 1983.

INDUSTRY SUPPORTERS FOR AIR TRAVELERS SECURITY ACT OF 1983

Air Transport Association (ATA)

Air Cal.
Air Canada.
Air Florida, Inc.
Alaska Airlines, Inc.
Aloha Airlines, Inc.
American Airlines, Inc.
Best Airlines, Inc.
Capitol Air, Inc.
Continental Airlines, Inc.
CP Air.

---

[1] Nevertheless, the Board disapproved cargo exclusivity because it *could not "conclude that other forms of cargo distribution would not have entered the marketplace if the exclusivity provisions had not been in place." Id.* at 116. No statement could more clearly spell out the Board's application of an impossible standard to those defending the programs.

Delta Air Lines, Inc.
Eastern Air Lines, Inc.
Evergreen International Airlines, Inc.
The Flying Tiger Line, Inc.
Frontier Airlines, Inc.
Hawaiian Airlines, Inc.
Midway Airlines, Inc.
Muse Air Corporation.
Northwest Airlines, Inc.
Ozark Air Lines, Inc.
Pan American World Airways, Inc.
Piedmont Airlines.
PSA-Pacific Southwest Airlines.
Republic Airlines, Inc.
Trans World Airlines, Inc.
United Airlines, Inc.
USAir, Inc.
Western Airlines, Inc.
Wien Air Alaska, Inc.

International Air Transport Association (IATA)

Represents over 95 International Carriers such as:
Aer Lingus Teoranta.
Aeronaves de Mexico S.A. (AeroMexico).
Air Afrique.
Air France.
Air-India.
Air New Zealand.
Alitalia—Linee Aeree Italiane.
British Airways.
Ceskoslovenske Aerolinie (CSA).
Deutsche Lufthansa A.G.
El Al Israel Airlines Limited.
Finnair Oy.
IBERIA Lineas Aereas de Espana S.A.
Japan Air Lines Company Limited.
Jugoslovenski Aerotransport (JAT).
KLM Royal Dutch Airlines.
Philippine Airlines, Inc.
SABENA (S.A. Beige d'Exploitation de la Navigation Aerienne).
Swiss Air Transport Company Limited (SWISSAIR).

American Society of Travel Agents, Inc. (ASTA)

Represents over 19,000 members in 128 countries.
Chandris Incorporated—Represents four cruise ships.
Clipper Cruise Lines—Represents one cruise ship.
Concorde Hotels International—Represents 19 properties in France.
Condominiums Unlimited—Represents 40 properties in Hawaiian Islands.
Cunard Lines—Represents five cruise ships.
Hyatt International Corporation—Represents 109 properties in 22 countries.
InterAmerican Travel Agency Society (Association of Black Travel Agents)—Represents 90 members in the United States.
Inter-Continental Hotels—Represents 108 properties in 47 countries.
Norwegian Caribbean Lines—Represents five cruise ships.
Ramada Inns, Inc.—Represents 601 properties in 18 countries.
Royal Caribbean Cruise Line—Represents four cruise ships.
Royal Viking Lines—Represents three cruise ships.
Hilton Hotels Corporation—Represents 90 properties in 44 countries.
Sunbelt Motivation & Travel, Inc.
Sea Goddess Cruise Limited—One cruise ship is presently being built.
Senate Commerce Committee Travel and Tourism Advisory Council.
Sheraton Corporation—Represents 452 properties in 55 countries.
Sitmar Cruises—Represents three cruise ships worldwide.
Thomas Cook Travel—Represents over 1,200 offices worldwide.

Travel and Tourism Government Affairs Council:
- Air Transport Association.
- American Automobile Association.
- American Bus Association.
- American Car Rental Association.
- American Hotel and Motel Association.
- American Recreation Coalition.
- American Sightseeing International.
- American Ski Federation.
- Association of Retail Travel Agents.
- Conference of National Park Concessioners.
- Gray Line Sight-Seeing Association.
- Highway Users Federation.
- Hotels Sales Management Association International.
- International Association of Amusement Parks & Attractions.
- International Association of Convention & Vistor Bureaus.
- National Air Carrier Association.
- National Campground Owners Association.
- National Caves Association.
- National Council of Area and Regional Travel Organizations.
- National Council of State Travel Directors.
- National Council of Travel Attractions.
- National Restaurant Association.
- National Ski Areas Association.
- National Tour Association.
- Recreation Vehicle Industry Association.
- Travel Industry Association of America.
- United States Travel Data Center.
- United States Tour Operators Association.

Travel Trust International.
U.S. Congressional Travel and Tourism Caucus Advisory Board.
Westin Hotels—Represents 51 properties in 11 countries.
Access for the Handicapped.
Carnival Cruise Lines—Represents four cruise ships worldwide.
National Conference of Black Mayors.

Senator KASSEBAUM. Thank you, Senator Warner.

It is a pleasure to welcome Congressman Glenn Anderson, representing the 32d district of California. Congressman Anderson?

STATEMENT OF HON. GLENN M. ANDERSON, U.S. REPRESENTATIVE FROM CALIFORNIA

Mr. ANDERSON. Thank you, Madam Chairman and distinguished members of this committee. It is indeed an honor and a pleasure to appear before this subcommittee to discuss the Air Travelers Security Act of 1983, H.R. 2053 and S. 764, as introduced by myself and our good friend and colleague, the Senator from Virginia, John Warner.

At the outset, let me commend you for scheduling this hearing in which you will hear from many in the airline and travel industry who are deeply concerned with Civil Aeronautics Board's competitive marketing investigation and its subsequent decision of December 16, 1982.

The year following airline deregulation, the CAB initiated its competitive marketing investigation to study the then-current structure of the marketing system for air transportation in the United States. The CAB order which initiated the study recognized that sales of air transportation have been made primarily by airlines and their authorized agents for over four decades, under agreements among most of the major airlines in this country, as members of the Air Transport Association, the Air Traffic Conference and throughout the world as members of the International Air Transport Association.

Although this had essentially been a self-regulated industry over the years, it is important to note that any rules or requirements established were subject to the CAB approval.

After personally hearing 3 years of testimony in the case, CAB Administrative Law Judge Ronnie Yoder issued his recommended order on June 1, 1982, which retained the basic framework of the airline ticket distribution system. This interrelated system consisted of voluntary agreements between the carriers, with standards for the utilization of common agents.

Specifically, Judge Yoder concluded that, "the public interest can be served only if that system is preserved."

Nonetheless, on December 16, of 1982, the CAB overturned Judge Yoder's initial decision. Essentially, the CAB, through recommendation by its staff, eliminated antitrust immunity for most travel agency-airline agreements, effective January 1, 1985; and eliminated travel agent exclusivity, thereby allowing nonaccredited sales outlets to sell airline tickets. Today, these nonaccredited agents can sell tickets for travel only on one airline—that is online tickets—and beginning January 1, 1985, these agents can sell tickets for travel on more than one airline, or interline tickets.

In his ultimate findings and conclusions, Judge Yoder stated that:

> Having considered all the evidence of record and having weighed the arguments and proposed findings of fact and conclusions of law submitted by the various parties, we find that the agreements at issue do not substantially reduce or eliminate competition, but do meet serious transportation needs, secure important public benefits, and are in the public interest and should be approved, subject to the conclusions set forth.
>
> The agreement should be granted antitrust immunity to the extent necessary to enable the parties to proceed with the effectuation of these arrangements.

Madam Chairman, as you will later receive in testimony from airline representatives, I will not burden this subcommittee with a time-consuming argument on why antitrust immunity should be continued. But I strongly encourage you, however, to carefully listen to their concerns. These fears of probable antitrust suits are real and the potential impact on the airlines and of course the traveling public, would be severe. Most feel that without this immunity, the potential costs would be too great for the airlines to continue the program.

Turning to exclusivity, I feel that there continues to be considerable confusion of what that term actually means. Simply stated, exclusivity provisions merely prevent nonaccredited persons from acting as agents for conference airlines.

As stated by Judge Yoder in his initial decision, the elimination of agency exclusivity—

> * * * would not result in increased competition, but would endanger the viability of the present worldwide air transportation marketing system, which depends upon the underlying trust and confidence of its participants in a program for the selection and supervision of joint agents.
>
> Abandonment of exclusivity would undermine intercarrier confidence in the travel agent network and in the reliability of interlining arrangements, thence threatening and reducing the availability of interlining, ticket interchangeability and refundability; reduce the ubiquity and universality of carrier representation by travel agents; threaten the competence, professionalism and universal representation of such agents; reduce consumer use of the travel agent marketing system and competition within it; and reduce the availability of travel agents representing all carriers providing consumers of complete and reliable information on all travel options.

I strongly believe that the uniform system of accreditation is the glue that holds the system together, particularly when one interlines. Judge Yoder found that:

> The present system of interline sales is acceptable to carriers because they have joint control over all travel agents, even those of other carriers, under the agreements between carriers that they will permit travel agent sales only by conference-accredited agents. If the agency exclusivity provisions were eliminated, control over such sales would likewise be eliminated, airline cooperative behavior would deteriorate and the interline system would be placed in serious jeopardy.
>
> If the interline system were impaired or dismantled, the general traveling public would suffer greatly. Passengers traveling long distances with connecting flights enroute might have to buy two tickets, and the second ticket might not even be available for sale at the origin point. The passenger might not receive the benefit of joint fares; might not be able to buy all of his tickets from one source; might not be able to check baggage through to his destination on a connecting interline flight; might require more time for connecting intervals because of the necessity to collect his baggage, take it to the other carrier and have another ticket issued; might lose the ability to use one carrier's ticket on the services of another carrier without purchasing a new ticket and refunding the old; and might lose the availability of connecting flights as connections became less critical in scheduling decisions.

And I ask, why should we subject the traveling public to this? It is interesting to note that Judge Yoder pointed out that—

> * * * other service industries have established uniform standards in order to assure quality and efficiencies in their industries which have been approved by antitrust authorities despite exclusionary effects of some potential entrants.

The court upheld entry conditions set by the Professional Golfers' Association for participation in professional golf tournaments:

> The purpose is to insure that professional golf tournaments are not bogged down with great numbers of players of inferior ability. The purpose is thus not to destroy competition but to foster it by maintaining a high quality of competition.
>
> Since the PGA had adopted reasonable means to accomplish this purpose, the organization "was not compelled to give special treatment merely because he did not wish to accept the tournament entry rules."

And there are many, many other instances—the insurance business, many other travel, foreign travel, surface transportation, labor-management relations, agricultural coops—many of these have a similar kind of protection.

In closing, just let me say that almost every major airline and national travel organization has endorsed H.R. 2053 and S. 764. In addition, as the Senator pointed out, 150 of my colleagues in the House have cosponsored my bill and at least 37 Senators have cosponsored Senator Warner's bill.

The marketing system of air transportation in this country and in fact, the world, has served the traveling public and the airlines well, particularly in these times of ever-changing fare schedules.

We have the responsibility to insure the continued integrity of this system. I urge this subcommittee to approve S. 764 as soon as possible. I thank you.

Senator **KASSEBAUM**. Thank you.

Senator Exon.

OPENING STATEMENT BY SENATOR EXON

Senator **EXON**. Madam Chairman, I want to thank Senator Warner and the Congressman for their excellent presentations. I am pleased to reaffirm my support for S. 764, the Air Travelers Security Act, which I cosponsored at the time that it was first introduced last March. I am happy to be in the good company of the majority of subcommittee and the full committee, as there are a total of 10 cosponsors of S. 764 on the Commerce Committee.

I recognize the time restraints of the Senator and the Congressman, and certainly I am not going to say anything here that needs any response.

Senator **WARNER**. I plan to join the committee at the invitation of the chairman.

Senator **EXON**. As you well know, Madam Chairman, S. 764 would overturn the 1982 Civil Aeronautics Board decision that could dramatically change the way in which airline tickets are sold in this country. The competitive marketing investigation decision essentially began a 2-year phaseout of the exclusive right of the travel agent to sell airline tickets, and would end antitrust immunity for industrywide agreements by January 1, 1985.

In its place, this legislation would impose an earlier decision to maintain the agency accreditation system and with it, antitrust immunity. At the same time, S. 764 would provide for increased competition by allowing some entry into the market.

My support of this legislation stems from an understanding of the important role of the travel agent in marketing airline tickets, as well as my belief that the CMI decision could potentially damage this Nation's integrated transportation system. Leaving this decision in place for full implementation could set the stage for widespread confusion among travelers, damage existing mechanisms that enhance cooperation among the airlines, and eliminate a system for marketing tickets of new entrants.

Madam Chairman, I want to congratulate you for scheduling this hearing. I look forward to working with you and other members of the subcommittee as we maintain a stable ticket distribution network available to all travelers.

Madam Chairman, I am also looking forward to the interesting presentation that you have suggested that we find up here today. It may well be that some amendments might be in order on the bill of which I am a cosponsor, and I am interested in that. But I simply say that so far as this one Senator is concerned, the action by the CAB is a significant step in the wrong direction. But I am willing to listen to any suggested amendments that might be made to clarify the act.

This mania for deregulation that we are going through today, which seems to have filtered through all of the regulatory agencies of the Federal Government, seems to me like essentially a bull in a china shop. Certainly we need some deregulation, but this idea that we can knock over all of the pillars that were there to serve the consuming public is something that I am delighted that the Senators are beginning to take a look at. After all, this responsibility essentially rests with us.

I thank you.

Senator **Kassebaum**. Thank you. Senator Goldwater.

Senator **Goldwater**. Not right now.

Senator **Kassebaum**. Senator Trible.

Senator **Trible**. Madam Chairman, I just want to commend my distinguished colleague from Virginia, John Warner, for his leadership here. Glenn, it is a pleasure to welcome you to the former body, my former colleague in the House. And I too look forward to the testimony today.

Senator **Kassebaum**. Thank you. Senator Pressler.

OPENING STATEMENT BY SENATOR PRESSLER

Senator **Pressler**. Well, I too join in those remarks. And let me say that my State of South Dakota has been one of the hardest hit by this deregulation effort. And I know that there have to be changes and I know that we cannot forever go on doing these as we did them for so many years, but on the other hand, I do feel strongly and I want to bring a message. I do have some questions, and I have to chair another hearing this morning in another building, but I will be back and forth.

I couldn't say more strongly how much this deregulation has hurt some rural and small-town areas in terms of basic service. And we have statistics that show numbers of boardings and opportunities for boardings, and how much our State of South Dakota has been hurt in terms of opportunities for travel and also for the delivery of supplies and air service in general.

Now "deregulation" is a good word. I remember I was in the U.S. House of Representatives when this was originally voted on. I was one of, I think, five or six Members who voted against the deregulation bill. But it is really reregulation. I think we have to take a whole look at where we are going, and that is part of the purpose of this hearing.

I am pleased to cosponsor this legislation. Coming from a rural State like South Dakota, I think it is especially important to retain some stability and security for our air travelers during this complicated and confusing time of deregulation.

The legislation we are considering today adequately provides for effective, intense competition in air traffic ticket sales, while providing readily accessible, well-trained, professional guidance for our Nation's air travelers to help them sort through the complicated maze of our air transportation system.

Air service abandonments, bankruptcies, strikes, and fare wars—these have all caused great confusion for the traveling public. Just recently, a major air carrier filed for abandonment of service to Pierre, S. Dak.—my home State's capital city. If this airline pulls out, South Dakota would be completely without jet service to its capital city, without adequate time to negotiate with a realistic alternative carrier to serve that city. This is just one example of how airline deregulation has caused great confusion and anxiety, especially in rural States like South Dakota.

The legislation we are discussing today helps maintain some sense of stability in this confusing market, while retaining the competitive market elements that we all agree should be the basis for any industry. But it also includes assurances of quality service at the lowest possible fares that the traveling consumer has the right to expect.

We have a need for efficient, timely jet service in our State capital. Our State capital has a relative isolation of that community from other populated centers, and we have the need for more time to find alternative service that meets the city's need. We have the need for guaranteed air service until carriers can more fully develop their regional systems.

I am pleased that service termination will be delayed, but more time is needed to acquire alternative service, probably over a year.

So those are some of the things that I am concerned about. I come here as a member of this committee but also as one from a State that has been hurt perhaps the worst of any State in the Union under this airline deregulation, which I call airline reregulation.

So, Madam Chairman, I thank you and I apologize for coming and going this morning but I am chairing a confirmation hearing in another committee, which I must attend to.

Senator Kassebaum. Would those participating in the first panel please come forward and take your seats? I appreciate your willingness to participate in this type of format because I hope it will allow us to engage in a discussion that will be productive.

I would just like to point out that the Department of Justice and the Office of Management and Budget were invited to participate in this panel format as well, but wish to testify separately and they will be testifying after the panel finishes.

Participating in the panel will be Mr. Frank Willis, Deputy Assistant Secretary for Policy and International Affairs, Department of Transportation; Mr. Dan McKinnon, Chairman, Civil Aeronautics Board; Mr. Gabriel Phillips, senior vice president of traffic services, Air Transport Association of America; Mr. John Meredith, general manager, the Americas, British Airways, International Air Transport Association; Richard Knodt, president, American Society of Travel Agents; Mr. Ronald Santana, president, Association of Retail Travel Agents.

It is a pleasure to welcome you and I would like to start, Mr. McKinnon, with you and your opening remarks.

Senator Exon. Madam Chairman, could I, for the record, insert a statement by Senator Hollings, who could not be here this morning, and asked that his statement be included in the record.

Senator Kassebaum. Yes. It has been done.

Senator Goldwater. Where is he?

Senator Exon. I don't know where he is, but I am sure he is out on the Lord's business.

STATEMENTS OF HON. DAN McKINNON, CHAIRMAN, CIVIL AERONAUTICS BOARD; FRANK WILLIS, DEPUTY ASSISTANT SECRETARY FOR POLICY AND INTERNATIONAL AFFAIRS, DEPARTMENT OF TRANSPORTATION, ACCOMPANIED BY SUSAN McDERMOTT, OFFICE OF GENERAL COUNSEL; RICHARD KNODT, PRESIDENT, AMERICAN SOCIETY OF TRAVEL AGENTS, ACCOMPANIED BY PAUL M. RUDEN, COUNSEL; GABRIEL PHILLIPS, SENIOR VICE PRESIDENT OF TRAFFIC SERVICES, AIR TRANSPORT ASSOCIATION OF AMERICA; RONALD A. SANTANA, PRESIDENT, ASSOCIATION OF RETAIL TRAVEL AGENTS, ACCOMPANIED BY BARRY ROBERTS, COUNSEL; AND JOHN D'A. MEREDITH, ON BEHALF OF THE INTERNATIONAL AIR TRANSPORT ASSOCIATION, ACCOMPANIED BY BURT RYAN, COUNSEL

Mr. McKINNON. Madam Chairman, I am particularly pleased to be here today. I would like to acknowledge that we have one member of the Civil Aeronautics Board with us, our newest, whom you recently confirmed and who was sworn in with the President in attendance, Barbara McConnell.

I would also like to acknowledge that in the course of the day, other parts of the administration of President Reagan will be here—the Department of Justice, the Office of Management and Budget, and the Department of Transportation, who have independently analyzed this case and who agree that the Civil Aeronautics Board made a wise and intelligent decision in what we did with the competitive marketing investigation.

I also appreciate the fact that Senator Warner is here so that we might be able to exchange views. Also, Congressman Anderson pointed out that accreditation is the glue that holds this together and the CAB, I would like to acknowledge, did leave the glue there by approving accreditation.

I have a 55-page statement that I am going to summarize in 3 pages.

Senator KASSEBAUM. Wonderful.

Mr. McKINNON. I would like to have it inserted for the record though, Madam Chairman, because it completely and thoroughly analyzes the issues in all respects.

As we consider the Civil Aeronautics Board's CMI decision, it really boils down to a political versus economic decision by the Congress, or another way of looking at it, a decision to support competition or support continued protection for an industry.

The Civil Aeronautics Board has made a wise economic decision that is needed today more than ever by the airline industry.

The financial squeeze is on the inefficient carriers.

They need to get their costs in line with the marketplace.

Regulation prompted inefficient airline operations.

The Government protected the industry and allowed it to get artificially high costs by shielding it from competition.

Now deregulation has the marketplace at work and the airlines must shed waste and costs that drive up ticket prices to the passenger.

The passengers strongly prefer lower fares.

If the expensive operators don't get their costs down, they will be out of business.

And that is what the competitive marketing case is all about. It allows carriers to determine what is the most efficient way to sell their own air services.

In 1980 the CAB allowed travel agents' commissions to fluctuate from the then-fixed 7 percent.

Today, they are about 10 percent.

But who determines what those commissions will be?

The 3-week Frontier Airline effort to drop commissions from 10 to 9 percent saw travel agents individually boycotting Frontier until the higher commission was restored.

United Airlines tried to pay travel agents per segments booked, regardless of the ticket price.

United felt the work involved was the same, regardless of the price of the ticket.

Agents rebelled at the idea. As ticket prices climbed, they wanted a bigger slice of the pie.

Just a couple of weeks ago, American Airlines tried to lower commissions from 10 to 9 percent and agents refused to cooperate.

And since they have the exclusive right to sell tickets, they have tremendous clout in determining what commission airlines must pay.

The CMI case ended exclusivity, which meant someone else could sell an airline ticket if an airline wanted to have other sources available.

This provides a discipline against the travel agent industry jacking up commissions too high for airlines to pay.

It puts marketplace forces to work, which serves the best interests of the American public.

It therefore will keep commissions more in line with the cost of the service that agents provide.

Airlines are being forced to cut costs to stay in business and keep jobs. As we have seen recently, higher labor costs are forcing changes on airlines and their employees.

Yet the commissions the major airlines have to pay to the travel agents in the past year were up to more than $1.3 billion, and that represents an increase of 74.3 percent since 1979.

If an airline wants to cut commission costs, the CAB decision is the only way they can do so.

You will hear all the talk about interlining of passengers and baggage, of antitrust immunity, common accreditation, area settlement plans and a host of other excuses to keep the current travel agent industry in its protected place.

Nothing is going to change the way travel agents do business, and there will be no new people selling tickets unless the airlines want change.

And why shouldn't they be entitled to change? They are the ones that have the billions of dollars invested in aircraft and facilities.

The travel agent industry was created as a service industry to serve the airlines and help passengers purchase a ticket.

Airlines aren't going to make any changes that harm their chances of selling one single ticket.

To stifle competition in this industry, to prevent new ideas from entering the marketplace, to lock in what could become archaic techniques of selling tickets for decades to come, when technology and electronic miracles are on the threshold of development, does not make good economic sense.

It doesn't even make good business sense.

It doesn't even make sense.

The CAB in the CMI case made the right economic decision that best serves the airline industry and the airline passenger.

So you are faced with a decision.

Do you support a good, long-term economic decision, or do you make a short-term political decision?

Do you support competition or do you support protection from competition?

So far this year, travel agent sales are up $2 billion compared to last year, and last year was the best in their history.

We made our CMI decision last December, and their sales are up $2 billion.

That simply proves what we have said all along: Agents are trying to preserve their sheltered position, and that does not serve the public interest.

If they are as good at what they do as they say they are—and I believe they are—then they have nothing to fear from competition. Competition is what made America great, and it will continue to make the sale of airline tickets serve the best interests of the consumer and the airlines.

Thank you, Madam Chairman. When we get to the questions I will be happy to participate in the answers:

[The statement follows:]

STATEMENT OF HON. DAN MCKINNON, CHAIRMAN, CIVIL AERONAUTICS BOARD *

Mr. Chairman, and members of the Subcommittee: I am pleased to appear here today on behalf of the Civil Aeronautics Board to discuss the Board's decision in the *Competitive Marketing Investigation*. This is very special testimony and I want to be sure that you have all the facts on this important case.

I ask that you accept for the record the two orders that the Board adopted in deciding the *Marketing* case. They provide a full description of the marketing system, the issues, and the Board's reasoning.

The principal focus of my testimony today will be on some of the main arguments I have heard over the past six months against our decision and in support of S. 764, the Air Travelers Security Act.

To begin, however, let me outline the main elements of the decision:

(1) An important part of our decision was that the Board bisically approved common accreditation and the agent ticket settlement system—the Area Settlement Plan.

These rules establish certain levels of competency, honesty and financial integrity, as well as rules relating to the use of standard ticket stock, the handling of remittances, ticket stock security, and so forth.

(2) We decided that travel agents should not have an exclusive license to sell air transportation.

The airlines should not be limited to only one way to sell their product—they ought to have other marketing options.

(3) The Board approved the rules that inhibit business travel departments from becoming travel agents but limited that approval to a two-year period.

(4) We concluded that the general rules of competition—the antitrust laws—should govern airline sales, rather than detailed government regulation by the CAB or its successor; and

(5) The Board recognized that this was a major change from the long-established system and would require a period of adjustment, so it provided for a two-year

---

* The appendixes referred to throughout this statement were not reproducible and are in the committee files.

period for transition. This permits time for fine-tuning the agreements to meet antitrust concerns.

We also said that we would reexamine the issues of antitrust immunity before the two years were up if it is demonstrated that there are materially changed circumstances, or if there is an important need for continuation of immunity.

These are the key conclusions. Our actions are based on over 40,000 pages of record evidence and testimony.

For example, the Board's initial opinion contains 139 pages of text and 425 citations, mostly to the hearing record. We took a long, hard look at the facts, the law, and the aviation policy that the Congress entrusted to our care.

Based on the Congressional inquiries enclosing their constituents' letters, letters we've received, and press reports, it appears to us that there is a lot of misinformation about the decision.

For example, one constituent wrote to a Congressman in support of the bill, saying our decision would make him carry his baggage between airlines. This simply is not true.

Another letter states that the decision would jeopardize the existence of an impartial consumer "watchdog" for the consumer. This is not true.

Press reports state that interlining will collapse because of the decision. This is not true.

I'm sure you have received this type of letter. We're not sure where the misinformation or misunderstanding about the decision is coming from, but we hope these hearings will clear the air, and put the burden squarely on those seeking special protection to produce facts to justify it.

When special protection is given, even for a good reason, it is not necessarily needed forever. Circumstances change. Special protection must be continuously justified, not just kept for the sake of keeping it. Antitrust immunity was given under a strict regulatory scheme that no longer exists.

Supporters of special protection should be asked over and over again:

Why does unfettered competition work everywhere else in our economy, but not here?

Why does lawful conduct require protection from the antitrust laws?

Why would airlines and agents abandon the fundamental economies of ticket settlement and interlining simply because they will have greater freedom to compete in the variety of ways that tickets are delivered to the public?

What policy considerations justify passage of a bill that will deny consumers the substantial price and service improvements from the Board's decision?

After ASTA's testimony to the House Aviation Subcommittee I have to wonder why they are still advocating passage of this bill. They said

(1) They are not advising their members to get out of the industry because of our decision. Transcript of July 28th at 65.

(2) They said that the Board's decision will not destroy travel agents. Id. at 55 and 66.

(3) They said that the legislation will not keep scoundrels out of the industry. Id. at 67–68.

(4) They said that the interlining system will not collapse if our decision stands. Id. at 107.

Even its supporters in the House agreed that changes to the existing marketing system—which would be preserved by S. 764—would be desirable.

In the remainder of my testimony, I hope to provide you with the facts about our decision—not unsubstantiated fears—so you can make an informed decision about the need for legislation.

At a minimum, even if you sympathize with travel agents' concerns, I hope we will be able to show you that S. 764 is not a wise legislative solution.

We conducted a comprehensive review of the marketing system because we wanted to see whether the airline distribution system that arose under regulation was compatible with the new competitive environment. Congress told us to review industry agreements as part of the movement to deregulation.

Under the old system, only airlines and their appointed agents could sell tickets. The agents were approved by almost all airlines through their trade associations, ATC and IATA. Detailed rules on who could be accredited and how they could operate were dictated by joint agreement of the airlines.

No airline could pick its own agents, or let its appointed agents deviate from the common rules, without raising doubts about its ability to sell its product through the commonly accredited agents.

The rules themselves were, and are, difficult to change. Not only did member airlines have to agree, but travel agent organizations also attempted to influence the process by making their views known on changes. The Board provided the agreements shelter from the antitrust laws so no one could challenge them.

In a nutshell, regulation produced an exclusionary system that bound all airlines to one—and only one—way of selling their product.

At the same time, sales through agents were and are crucial to virtually all of the airlines. About 60 percent of domestic and 80 percent of international seats are now sold by agents.

Some people say there is no reason to change the system, saying, "It isn't broken, so why fix it?"

There are substantial problems with agreements that unnecessarily restrict competition.

Ticketron, for example, believed it had a better idea. It wanted to save both airlines and consumers money by selling simple, point-to-point tickets through its outlets at some 650-plus locations throughout the country.

Airlines could not use it without giving up the benefits of common agents, because of exclusivity and other rigid rules.

American Express decided it could compete better if it could set its own company standards for managers at its 125 travel sales locations throughout the country, while still maintaining its responsibilities to the airlines and the consumer.

It couldn't enter into special arrangements with air carriers because variations on the common personnel standards were not permitted.

Hotels-Autos-Tour-Air (HATA) wanted to be compensated for booking reservations over the telephone, in conjunction with the translation services it provided foreign visitors. When it approached American Airlines, American said HATA could not be compensated because of the exclusivity provisions.

Airline Tickets By Banks (ATBB) felt that automatic ticketing machines for simple transactions, placed in banks, would be profitable as well as reduce costs to airlines and consumers. This idea also didn't pass muster under the strict rules of the conference agreements.

These are four concrete, innovative ideas in the record before the Board that might have promoted air transportation, increased marketing efficiency, and saved many consumers and airlines money.

But airlines could not begin to consider them because of the conference rules, particularly the exclusivity provision.

And there are other examples of new ideas that never made it or will not make it because of the strict restrictions of the common—and exclusive—marketing system. I'll get to those in a few minutes.

Some people may tell you that the ALJ opinion would allow as much competition as our decision.

By doing away with words in the agreements making accredited agents the sole means of marketing air transportation, the judge was attempting to allow some form of competition. But the ALJ opinion approved language in which all carriers pledged that the only agents who would sell airline tickets are ATC or IATA accredited agents.

After carefully reviewing the testimony in the case we could only conclude that by retaining the "agency" exclusivity provisions, the ALJ opinion effectively retains the entire exclusionary system.

The key word in the exclusivity provisions is the word "agency."

The legal principles of agency provide that an agent is anyone authorized to act on another's behalf. Virtually everyone who might market air transportation would come within this definition.

With the retention of agency exclusivity under S. 764, anyone that acts as an agent must be approved by ATC or IATA. So only those who operate in prescribed ways are the exclusive agents for the sale of airline tickets.

People are now telling you that the ALJ's opinion, which purported to strike down "marketing exclusivity," will permit the neighborhood Safeway to sell tickets. This interpretation directly contradicts the sworn testimony in the oral hearing and statements to the Board.

ATC called the ALJ's distinction between marketing and agency exclusivity "a fiction without legal precedent." (ATC Brief to the Board at 3–6.) The testimony of Louis Person for IATA was that ATC exclusivity—which includes both "agency" and "marketing" provisions—and IATA exclusivity—which only as "agency" provisions—had the same effect. (53 Transcript 158.)

Paul Bessel for ASTA stated flatly: "without any question the two rules are intended to mean the same thing." See Appendix A.

The way Ticketron wanted to operate would violate the restrictive ATC and IATA personnel and location standards that the ALJ approved. The ALJ opinion also explicitly acknowledges that the purported distinction between "ticketers" and "agents" would not necessarily help Ticketron because "the distinction between agent and non-agent status may be a difficult legal question to resolve in any given case, and we do not undertake to draw those distinctions here." (I.D. at 68, n.1).

Recognizing these facts, the ALJ opinion creates a sui generis, i.e. one of a kind, exemption for Ticketron.

By its very terms and the opinion's discussion of the issue, it is clear that the exemption only extends to that named entity. Even though this would create a monopoly, this anticompetitive result was justified by the dubious suggestions that Ticketron was a natural monopoly and it was the only nationwide ticketing service that currently exists. (I.D. at 68, n. 2).

Presumably entrenching its alleged monopoly position with an exclusive government license was not seen as anticompetitive. The underlying assumption is that competition is substantially reduced only if an existing entity appearing before a federal agency can prove that it has a viable marketing scheme that has been excluded. The appropriate relief under the ALJ opinion is not the elimination of the unjustified anticompetitive features of the agency program. Rather, an injured party must demonstrate that it merits special exemption from the ATC and IATA standards.

Indeed, the clear intention of the ALJ opinion is that other potential entrants such as general merchandise retailers, e.g. large department stores, and credit card/cable TV combinations or similar technical innovations may sell airline tickets only if they are "willing to comply with the agreements." I.D. 69.

In other words, all other persons who do not wish to meet the accreditation standards are prevented as a practical matter from selling any airline's tickets. To keep them from selling tickets, agency exclusivity was retained.

Ticketron could not reasonably be excluded because it had proven that it could deviate from the ATC standards yet still be a viable marketing scheme. Yet another key consideration was that it had satisfied the ALJ that Ticketron's services would be a "viable though limited alternative to the current distribution system operating through travel agents." (I.D. at 67. Emphasis added). In order to compete, it had to prove that it would not divert revenues from existing entities.

The logic of this process is identical to route selection cases under strict regulatory assumptions. A potential marketing entrant has to prove to an adminstrative agency that the "public convenience and necessity" requires competing services to satisfy unmet market demands in a way that will not divert substantial revenues from the incumbent. (The relevant discussion from the initial decision on all these points is contained in Appendix B.)

At best, adoption of S. 764 means that a whole new regulatory structure would have to be created to determine whether an agency relationship existed and, if so, whether the proposed service was "economically viable" and not financially threatening to existing agencies, and therefore deserving of sui generis exemption from the accreditation rules.

This orientation is completely at odds with what has already happend with airline deregulation.

Meaningful competition exists only when a firm can act without first getting the permission of its competitors and the government.

Since S. 764 would retain administrative oversight and significant regulatory barriers to entry, it simply does not allow true competition.

As long as travel agents are protected from meaningful competition, they will benefit at the expense of airlines and passengers.

Let's look at the facts.

The number of agencies has grown at a phenomenal rate. Since 1971 they've increased at an annual rate of 11 percent per year. In 1971 there 8,209 travel agencies. Today there are over 20,962. (See Chart No. 1.)

Agency annual dollar volume has almost doubled since 1974 when the Board began removing anticompetitive provisions on a piecemeal basis.

Travel agent sales really took off after deregulation, going from $19 billion in 1978 to $31 billion in 1981. (See Chart No. 2.)

Air carrier commission payments have shown an even more dramatic increase of 167%—from $847 million in 1977 to $2.265 billion for the 12 months ended June 30, 1982. (See Chart No. 3.)

Despite our decision, the amount of air transportation sold by agents continues to increase.

For the month of April 1983, sales processed through the Area Settlement Plan increased 20% to $2.2 billion, compared to April 1982.

The amount paid to travel agents was up 17% to $202 million.

The increase was not due just to the 9% increase in the number of agents over the previous year.

Individual agents sold more air transportation.

The average weekly sales report rose 15% to $25,556. (Travel Weekly, page 1. May 23, 1983) And in June 1983 travel agents recorded sales of $2.7 billion in airline tickets. That is greater than their sales for the entire year of 1970. (Aviation Daily July 19, 1983.)

Historically, airline passenger miles and revenues have not increased at anywhere near the same pace. (See Chart No. 4.)

The travel agents will probably tell you this is all due to the great job they're doing.

They are right, which gives me a hard time understanding why they are afraid of competition. In fact, according to letters we have received, I don't think that many agents on the street are afraid.

Commissions represent the fourth largest expense category to airlines, right behind labor, fuel and equipment costs. (See Chart No. 5.)

Airlines have done much to make fuel go a longer way.

And labor has begun to see that it must be more productive—and in some cases, less expensive—in order for the airline to be competitive in the marketplace. They did this only in response to competitive pressures.

Airlines have tried to reduce their commission costs as well—but they have not succeeded. Commission payments have increased from $847 million in 1977 to $2.265 billion for the year ended June, 1982. (See Chart 2.)

When Frontier proposed to lower its commission rate to nine percent in April, 1981, it got absolutely nowhere.

Just a few weeks ago, American Air Lines announced its intention to lower the base commission rate to nine percent as of September 19th. It changed its mind within a few days because of the negative reaction of the agent community.

When United proposed to depart from strict percentage basis to a more service-oriented way of figuring compensation for agents, it also got nowhere.

The short of the matter is that no major airline, acting alone, can afford to offer lower commission rates than others, because they depend on agent sales so much. As a consequence, they can compete only in limited ways. Costs to consumers increase as a result.

Everyone pays for the airlines' marketing costs in the price of the ticket. Between 1978 and 1982, traffic commissions as a percentage of total operating revenue have risen by 38%.

And unlike the trends in fuel and wages, the cost trend here is clearly continuing to increase. (See Charts 5 and 6.) That's because there is no competitive spur to control marketing costs.

In contrast, competitive pressures have forced airlines to control fuel consumption and to bargain hard for wage and productivity improvements. Indeed, it can be argued that pressure on labor for wage and price concessions is greater as long as commission costs remain out of control.

Airlines will not have the freedom to use untold innovations if the Board's decision is reversed. For example, consider:

Direct sales through computers in business or homes, where the seller is compensated for taking the reservation;

Ticketing machines placed by agents in remote locations;

Sales outlets that are open only on weekends or in the evenings; and

Sales outlets that only do business over the telephone.

These are lost opportunities. They may never work, or they could work well.

But they have been judged inadequate by competitors, not consumers.

What I have told you up to now is not theory or philosophy—it is fact. The reasonable conclusion to draw from these facts is that individual airline innovation is severely stifled because of an exclusive system of marketing. New ideas simply do not have an opportunity to take root.

As a review of the recent ATC meeting minutes reveals, carriers and travel agent representatives most frequently opt for the historic ways of doing business. At least some participants would prefer change because, in the words of one, "technology [is] getting ahead of the rules." (See Appendix C, page 2.)

Marketing is reduced to the lowest common denominator—only if every major airline and most agents agree that a new way of doing business is good, will it get a chance to be tested in the marketplace.

Since neither airlines nor agents, as a group, have much incentive to embrace new ideas, innovation will necessarily come slowly, if at all.

In this day of rapid change to a deregulated air transport system, a static marketing structure is simply not practical.

Change, which produces more efficient ways of doing business, is difficult to accept, but that is the essence of competition.

The lack of competitive innovation hurts the airline industry because no major airline can try better ways to sell its product in response to the demands of the deregulated marketplace.

No airline should now be legislated into a marketing straitjacket when the former regulated system may not solve its needs in the present or future competitive environment.

At the risk of simplifying too much, the Board looked at the restrictions on competition and asked why they were necessary. What public interest did they serve?

The answer, in short, is none. The facts showed that excluding everyone but ATC/IATA agents from marketing served no legitimate purpose. It only protected those who agreed to do business in one certain way: the agents and those airlines that did not want to compete in marketing.

An exclusive license for travel agents is not needed for the efficient distribution of airline services: it does not increase productivity, or lower costs. This is fact, not theory.

The economic incentive for the airlines to continue the travel agent program is provided by the Area Settlement Plan and certain basic common accreditation standards. It is an efficient, cost-saving way to establish a widespread, competent, and secure distribution system—but not necessarily the only one that could be devised.

Exclusivity contributes nothing to these legitimate objectives.

A number of airlines initially opposed deregulation because some predicted chaos and economic doom at the hands of the large carriers. But they now appreciated the freedom that the Board and Congress gave them to compete.

They almost universally favor deregulation today even though times have been tough for the airlines.

Indeed, many feel that they could not have survived the recession without the freedom that deregulation has given them.

And it seemed only fair to me, as we turned each airline loose to survive or fail based on its management talents, that they certainly needed to have control over all of their operations, including the sale and marketing of their own tickets.

In 1978 the Congress passed the Airline Deregulation Act. Congress told the CAB, in no uncertain terms, to place reliance on competition and market forces to the greatest extent reasonably possible. Anticompetitive agreements are far more difficult to justify under the Act. Also, antitrust immunity no longer follows automatically from Board approval.

The Board has complied with the law by seeking to reduce the anticompetitive aspects of the airlines travel agent agreements.

For example, in 1979 we disapproved that part of the agreements that allowed the airlines to set uniform commission rates, in other words, to fix the prices they paid their agents. The base commission rate has risen since then by 42 percent, from 7 percent to an average of 10 percent.

There are other examples where the Board applied the principles of the Deregulation Act—even before that law was passed—to redress the competitive structure of marketing.

The Board was concerned about the airlines abusing their economic power, especially in view of the protection from antitrust challenge that they received because of antitrust immunity. Airlines cooperative decisionmaking was used to carve out markets that would only be served by the airlines.

The original travel agent agreements were not comprehensive and allowed substantial carrier discretion.

Over time, however, the airlines greatly expanded their scope and the Board's regulatory role increased concomitantly. Airlines attempted to relegate travel agents to the role of "promoters" of air transportation among discretionary travelers while the airlines attempted to retain "non-discretionary travelers" who needed only simple ticket services.

In the recent past, the Board made many decisions—justified by the need to promote competition—that have helped agents. (See Appendix D.)

The agents have made the most of their competitive freedoms. For example, corporate travel now is the fastest-growing part of travel agents' business. Indeed, it now represents 54 percent of agency bookings compared to about 43 percent just a few years ago. (See Chart No. 7.)

The *CMI* decision is only the latest of a consistent line of Board actions favoring competition in marketing.

There are a few points that should be made:

(1) Overall, the Board has been evenhanded in exercising its mandate. Its decisions have been philosophically consistent, not an attempt to favor agents or airlines. The agents complain now, but they have cheered deregulation at other times. Indeed, certain agent groups are right now urging us to disapprove or deny antitrust immunity to Scheduled Airline Traffic Office (SATO) agreements.

(2) The Board's decisions have been based on a careful look at the facts. Anyone who argues to the contrary hasn't read our decision, or doesn't understand it, or chooses not to understand. To be sure, the Board is disposed to favor competition and deregulation, as Congress told us to do. But our decisions are firmly grounded on the facts.

(3) If S. 764 had been in effect, I doubt whether any of the decisions favorable to travel agents would have been made. The bill says that air carrier cooperative agreements enjoy a strong presumption of validity. That will be very difficult to overcome.

For example, recently the airlines met and, with the antitrust immunity granted ATC discussions, collectively proposed doing away with in-plant agency locations over the objection of certain agencies that specialize in corporate travel. See Appendix C. (Because of an earlier Board decision, carriers do not enjoy immunity to fix commission rates; however, they still have immunity to discuss the adoption of rules to do away with certain types of agency locations). The declaration of policy in S. 764 requires that the Board protect air carrier cooperative working relationships establishing qualified sales agents. If the airlines were to decide collectively that particular marketing ideas—even those that exist today—should be discontinued, the legal authority of the Board to disapprove this type of concerted refusal to deal could be questioned.

Will the Board's decision destroy the airline distribution system?

In short, "No".

If changes happen, they will be in response to the demands of the marketplace. The Board did not force change—it simply removed obstacles to legitimate forms of competition.

If the present travel agency system is efficient, economic and fully satifies consumer demands, there will be no major changes. And if an agent is good at what he or she does, the agent doesn't have to fear competition. The agent will prosper under the free enterprise system.

But it is also likely that a greater variety of distribution techniques with varying costs will emerge to serve specialized consumer demands. We have already seen this occur among the airlines. Consider for example, People Express and Air One, at opposite ends of the service options spectrum.

The essential point is that competition is a better way of determining what is best for airlines and their passengers.

The idea that the government should be devising and supervising a uniform, inflexible, industry-wide distribution system belongs to the days of pervasive federal regulation of all aspects of air carrier behavior.

S. 764 is being touted as a consumer protection bill. Some people argue that airlines will tend to appoint incompetent agents and the consumer will suffer as a result.

The effect of S. 764 will not be to protect consumers, but to protect travel agents from competition, at the expense of consumers.

The advocates of S. 764 would have you believe that we disregarded the interests of consumers.

That doesn't square with the facts.

The Board has retained consumer protection regulations like denied boarding compensation, baggage liability, and no-smoking rules when it is convinced that the marketplace provides insufficient incentives to protect passengers in their dealings with airlines. We take a hard look at the facts before we act.

In the *CMI*, we carefully analyzed the claim that competence and honesty will suffer. But airlines have absolutely no interests in turning their retail operations over to people who are incompetent or dishonest. Take a look from the airline's perspective:

The airline must provide the transportation, or a refund. Under law, the airline must take responsibility for the actions of agents it has allowed to sell its tickets. The consumer always has recourse to the airline for a refund.

It must financially back up each of its tickets that is written for transportation over another airline.

The airline bears the cost of any ill-will generated from improper ticketing.

The airline wants to satisfy its customers.

Ticket stock is like a blank check on the airline's account, so security and trustworthiness will always be a high priority.

If you wish to insure ticketing competence, it would require more stringent licensing to achieve it.

Notably, however, it was travel agent opposition that in large measure let ATC to withdraw a rule that would have tested agents' ticketing skills.

S. 764 does not insure competence, honesty, or financial integrity.

Rather than focus on the opportunities presented by competition, some agents fear the loss of business if other marketing alternatives are permitted.

This fear is greatly exaggerated.

One of agent's own witnesses testified that travel agents would lose only 2 percent of their sales if their exclusive privilege is lost.

ASTA now challenges the testimony of its own witness at the hearing as unreliable. In a recent letter to the House Small Business Committee it says its assumptions were optimistic and unrealistic. But it's a little late to attempt to discredit your own witnesses.

In that same letter they revise upward the amount of business agents will lose. Now they say it will be $700 million in sales or $70 million in agent revenue. The new figure is 2.2% of 1981 total sales, which includes tours, hotels, car rentals, besides airline sales. It is 3.2% of 1982 sales through the Area Settlement Plan and 3.4% of 1981 agent commissions. When agents say they will lose $70 million in commissions because of our decision, remember that commission payments to agents increased by $151 million in 1982. That figure is only for the so-called national or major carriers. It doesn't include foreign carriers or new entrants or commuter carriers. (See Chart No. 4.) Our decision will merely slow the rate of agency growth, not deprive agents of revenue, even if these new, untested figures are accepted.

Our conclusion, therefore remains unchanged. The agency system will not suffer severe economic harm because of our decision.

Another argument you will no doubt hear is that the integrated air transportation system, which permits interline tickets and interconnection of baggage, will be harmed.

This is not a new argument. It is perhaps the most overworked theme from the sky-is-falling school of advocacy.

To begin with, the interline agreements are separate agreements that do not directly relate to the agency programs. The interline agreements were not at issue in the Marketing case and the decision does not affect the immunity they have.

The basic baggage and ticketing interline agreement is ATC resolution 5.65, which now has antitrust immunity. We will provide a copy of this agreement for the record.

However, there are many other interline agreements, frequently much more complex, between individual air carriers that have operated without antitrust immunity for years. There are also interline agreements in other transportation industries which have no immunity.

As the Department of Justice's antitrust chief testified in the recent House Aviation Subcommittee hearing on the legislation to overturn the Board's decision, such agreements do not need antitrust immunity because of their obviously beneficial effects to consumers and competition.

We are generally skeptical of the argument that the interlining system will collapse because we have heard it so many times before. The argument was raised when the Board proposed disapproving fixed commissions (1978–79), ending mandatory joint fares (1980–81), adopting the maximum tariff rule (1981), and before the statutory elimination of domestic tariffs, to name a few instances.

The proposed changes all came to pass.

Despite predictions of disaster, interlining continues unabated.

There simply is no evidence or experience to support the competitive madness theory. The evidence all goes the other way.

The economic reality is that airlines interline because they make more money that way, by attracting additional traffic.

Even the largest carriers serve only fractions of all possible city-pair markets. To get a portion of the fare from A to C, an airline traveling from A to B will interline with one going from B to C.

Airlines have every reason to continue interlining. John Zeeman of United Airlines recently came to the same conclusion. See page 41.

ASTA's testimony before the House was that it would be silly to suggest that interlining will collapse. (Tr. at 107–08).

The bill's supporters and indeed the Board itself believe that interline agreements do provide substantial benefits to travelers. So it is therefore instructive to analyze what they do and what they don't do.

The agreements are solely among airlines; they deal with settlement procedures. The signatory airline agrees to be financially liable for any ticket it authorizes.

Airlines routinely accept interline tickets written by business travel departments (BTDS). BTDs are not accredited and, until our decision, could not be paid commissions. Nevertheless, airlines gladly accepted the tickets they wrote to get interline revenue. The advent of non ATC/IATA accredited agents who receive commissions will not alter the carrrier's desire for this revenue.

The agreements may be entered into by carriers who are not members of ATC or IATA.

The agreements are voluntary. Airlines are able to elect not to participate or agree to interline with any carrier or carriers of their choosing.

Finally, the industry agreement is non-exclusive. Airlines may bilaterally or multilaterally agree to any terms they choose. Some of these individual agreements do not enjoy antitrust immunity; yet carriers enter into them.

The lesson is obvious: the interline agreements prove that a voluntary and non-exclusive system of standards is entirely sufficient to satisfy consumer needs without stifling individual carrier initiatives. In short, interlining provides its own economic incentives to participate.

In order to put this argument to rest entirely, let me assure the Committee that the Board would be very concerned about an erosion of the interline system. The only way to stop such a development, however, is through direct government intervention. Continuation of exclusivity provides absolutely no assurance that interlining will continue.

We will continue to monitor the interline system. If there are clear signs that it is deteriorating, to the disadvantage of the consumer, we will not hesitate to take appropriate action. Our interest is to have a solid, efficient airline system—but a truly competitive one—that ensures the efficient use of assets and people—because that will best serve the public interest.

Make no mistake, however: the issue is really whether travel agents should continue to enjoy a monopoly on payment for writing interline tickets.

What about the airlines? Why do they seem to be unhappy with the Board's decision?

First, change is always upsetting.

The universal agency system is a security blanket.

Competition can be cold, hard, and unpredictable.

Airlines resisted deregulation of routes and fares also, but have since seen its benefits and don't want to turn back.

Second, exclusivity makes an airline executive's job easier. He does not have to worry that a competitor has devised or is using a cheaper marketing system. The only nondirect sales outlet permitted is the travel agent. As long as he pays competitive commission rate—and commission rates are essentially the same—he will not be disadvantaged.

Third, I believe that the airlines do not feel entirely free to voice their concerns. Agents have the ability to affect airline revenues by shifting their business.

Travel agents believe they have the power to influence carrier decisions. When United proposed a flat commission the editor of Travel Trade praised the retaliatory action agents took against United.

"Remember how quickly United's business melted away under the bright lights and heated reactions of travel agents in response to a plan which have eroded their commission percentages with each inflationary rise in air fares. It is (the editor's) hope that this experience taught every airline that when you try to take something away from travel agents which is rightfully theirs, you run the risk of having agents place their ticket sales with those carriers which do place a high value on their travel agency sales distribution system. * * * "I am absolutely positive that the travel agent industry has the marketing muscle and the sales clout to make or virtually break any travel product or service. I am equallly convinced that there are some travel principals, including some scheduled airlines, who will violently disagree with this contention, and who will decide to test it in the marketplace, either openly or covertly."

* * * * * * *

"The best way to minimize the implementation and impact of maximum fares is to let all of the airlines know where you stand on this issue. In the words of Mr.

Nofziger 'Don't get mad, get even.' " Eichner (Ticketron) 76 Tr. 81-82 quoting Travel Trade of August 31, 1981.

After the Marketing decision Travel Agent Magazine reported that "Agent Clout Should Keep Airlines Loyal." It reported:

"Travel agents across the country, for the most part, feel the airlines will stick to their guns and deal only with retailers—this despite competitive pressure and the recent CAB decision allowing carriers to deal with nonappointed venders.

"However, the Travel Agent's spotcheck showed many agencies ready to fight fire with should airline plates and stock begin showing up in unlikely places."

* * * * * * *

"Ron Carr, owner of Ron Carr Travel in Dallas, said, 'I feel the airlines should be able to just keep dealing with agents. My feeling is the Uniteds, the TWAs, the Americans and the Deltas have a lot of money invested in their computer systems installed in agencies.'

"Not only that, retailers still have a lot of business clout. You remember what happened when Frontier (reduced) commissions to nine percent and a couple of other airlines followed.

"We screamed real loud and booked with airlines that paid 10 percent. I don't see a mass movement by airlines to non-appointed locations or businesses. You may see some smaller carriers and those in financial trouble going that way.

"It's going to take a gutsy airline to make the first move. If they do, we just won't sell them. I don't know anything else agents can do but use this business clout."—Travel Agent, January 10, 1983.

Our decisions cite a number of other instances in which travel agents influence airline decisions. Orders 82-12-85 at pages 46-47 and 83-3-127 at 16.

If you were an airline manager, I seriously doubt you would want to test the agents' power to divert business to other carriers.

In short, I believe that airlines feel boxed in. If they take any position that is perceived as against the travel agents' interest, they risk retaliation. The risk is substantial because of the overwhelming volume of agency sales. And some agent organizations have made overturning the Board's decision their major objective.

Finally, another clue about what may be wrong was provided in the hearing before the House Aviation Subcommittee last June on airline computer reservation systems. Carriers that provide computer reservation systems have a vested interest in retaining a unitary travel agent system because they control the computers upon which travel agents have come to depend. The systems that give a preference to the host and cohost airlines steer more traffic to them. Any effective alternatives to the agency systems will tend to dilute this effect.

In this connection, I'd like to address an argument you may well hear today, that unbiased industry agents will be replaced by captive agents representing only one carrier.

The reality is that deregulation has already made substantial changes. Commission incentives, biased computer systems, and intense price and service competition among airlines have affected the marketing environment. This includes override commissions to influence agents away from impartial judgments in booking tickets. See Appendix E.

But this does not mean that exclusive dealerships are an inevitable result of competition.

Many retailers find it in their interest to maximize the number of products offered. They find that consumers prefer to be able to compare all the goods or services available to them at one time. The retailer is then able to sell to various purchasers with a wide variety of tastes and preferences. This translates to increased profits. For example, many stock brokerage firms are represented on a number of markets and independent insurance brokers represent a number of insurance companies. It is also true when goods are sold. Groceries and liquor stores are two examples.

The captive agent scenario is all the more unlikely because the relationships have already been established. A breakdown in the current distribution mode would require carriers to withdraw their plates en masse or agents to relinquish their rights to plate a carrier. In fact ASTA's own witness testified that each airline would "grandfather" all of the agents with which it had been dealing. Nathan (ASTA) 72 Transcript 149-50, 163-65.

The carrier pursuing a captive agent strategy would be forfeiting sales without any apparent gain. The agent would also be giving up a wide revenue base derived from a number of carriers. It is very implausible that an airline could account for so many local sales that it could satisfy the demand of all the agents' customers.

Similarly, even very high commission rates would be unlikely to cover the loss of volume in ticket sales on other carriers. While some exclusive agents may develop, they are likely to be found, if at all, in very high density markets. They will not supplant sales outlets with wide representations.

There is nothing intrinsically wrong with outlets that sell only one or a few lines. Consumers can readily identify retailers that specialize. If a serious problem of unfair competitive practices or deception were to occur, various agencies, at local, state and federal level—including the CAB—can step in to correct it.

True consumer protection legislation is not at all incompatible with competitive distribution of airline tickets.

ASTA has argued that continued CAB regulation is necessary to keep the states from stepping in to regulate the competency and honesty of travel agents.

Some states already regulate travel business. There is no Federal preemption that derives from Board approved programs.

Moreover, it is not at all obvious why a uniform travel sales system is necessary. If a state wants to provide some protection for its citizens, this legislative judgment will presumably be based on its view of consumer needs.

On the other hand, the standards which competitors agree upon may be designed more to protect their narrow interests than the interests of the consumer. For example, the bond posted by an ATC agent is to protect the airlines, not the agency's customers.

A review of state laws provides support for this view. (See Appendix F.)

First, several states have laws governing nonaccredited tour operators who provide bus and rail tickets. Generally, they are required to post a bond. One point to be noted is that there has been no noticeable outcry about the incompetence of these particular travel vendors.

Second, bonding is generally all that is deemed necessary to protect consumers interests. The bonds often exceed those required by ATC.

Only Rhode Island provides for licensing using alternative educational and testing standards, which do not exempt ATC accredited agents. This contrasts with the experience standards of ATC. Finally, we should note that ASTA, in fact, has strongly supported state regulation bills.

If Congress desires preemption of state regulation and true federally mandated, consumer protection guarantees, it can achieve these goals only through direct Federal regulation. S. 764 would do nothing to advance these goals.

How will the Board's decision provide greater public benefits? Have we given up a sure thing for speculative benefits?

Some of the beneficial aspects of potential competition are already beginning to surface. Many agents have begun to evaluate how they can provide better services to passengers. A sample observation in the travel press is attached as Appendix G.

Moreover, some travel agent observers have suggested that the prospect of competition will discourage entry by individuals who are not serious about providing true customer service. (Travel Agent Magazine June 6, 1983 at 44.) The Board's decision talks about the threat of potential competition as an important prod to efficient operations. As these articles demonstrate, it's not just a theory; it works in reality.

These benefits will take some time to develop.

Innovative marketers should not be expected to enter instantaneously—they will need time to formulate plans and make arrangements.

We didn't see new airlines start operations the day after the Deregulation Act passed either.

It's also unrealistic to demand proof beyond a reasonable doubt that competition will produce dramatic benefits.

There are a lot of travel agents out there—small and large—that have good ideas worth pursuing in a truly free market. In this regard, the Board's decision will help many travel agents because they can now bring their entrepreneurial skills to bear, for the first time, without having to convince all airlines and all other agents to change the system. There are indications already that a number of agents welcome the challenge.

Many agents feel that ATC and IATA place unreasonable limitations on the way travel agents do business. They are looking for better ways to do business. Indeed, some years ago there was considerable debate in agency organizations about the potential benefits to agents from the application of procompetitive policies. (See Appendix H.) In 1978 ASTA suggested that all anticompetitive agreements be disapproved within 5 years. (See Appendix I.)

It's obvious, though, that "competition" today exists only in the number of travel agencies that are doing business in the same way.

Many ATC and IATA accreditation provisions are not simply minimum standards to insure travel agent competence.

They control many aspects of the business.

When coupled with an industry agreement to deal only with persons meeting these standards, normal growth and development is stunted.

To sell airline tickets you have to satisfy the ATC that you meet the following standards, as well as a number of other requirements:

Employ a manager at every location with two years experience promoting transportation;

Have an employee with one year ticket writing experience gained with an ATC or IATA carrier or travel agency;

Have a location that is open and accessible to the general public and clearly identified as a travel agency;

Have the qualifying manager on duty and be open for business 35 hours a week; and

Not appear likely to do more than 20 percent of its business with an affiliated corporation, its shareholders or employees (in any event, any affiliated sales are not commissionable).

A lot of people don't meet these requirements. They are barred at the door. ATC claims that only 5 percent of "serious" applications are denied.

But what they don't tell you is that they usually send out a letter or talk to people about the ATC standards first. Many more people than are ever accredited are interested enough to write or phone ATC. (See Chart No. 8.)

Most of those that do not qualify under one or more of these strict requirements do not apply. But it is fallacy to assume that all those who inquire but do not apply are not "serious" candidates.

That these requirements are not simply minimum standards that are needed to assure competency is illustrated by individual airline practices. Airlines allow business travel departments (BTD's), trade associations and universities to write tickets based on the same information available to agents. Airlines also give corporate or other offices their blank airline ticket stock even though the individuals they employ do not meet the ATC or IATA standards. In-plant agency branch locations on customer premises also do not satisfy the ATC requirements. They often use customer employees. Indeed, they are often indistinguishable in function from BTD's they replace.

These are real-life examples of substantial exceptions to the ATC/IATA standards. If the standards are crucial, as claimed, then we already have a lot of unqualified people writing tickets. That does not seem to be the case.

The real issue is not who writes the ticket, but who gets paid.

Some corporations and associations are interested in getting ticket writing compensation without having to set up an in-plant. But they were barred from establishing an agency or getting ticket writing compensation.

The Board's decision on BTD's does not provide that BTD's can automatically get travel agent commissions, either now or after the two-year transitional period.

The Board only said that airlines could not collectively agree to boycott BTD's—or any other potential distributor.

Airlines are free to decide individually not to compensate a BTD or to pay less than a full commission.

I have already identified a number of real-life examples of new ways of marketing airline tickets that have been needlessly excluded. I have also identified some of the restrictive provisions of the ATC/IATA agreements. Tying the two together, we can identify other types of businesses that are effectively precluded from marketing to airline passengers.

There are two means of discouraging entry: Outright prohibition of certain business practices and the imposition of costs that make it uneconomic to operate.

In the first category, the physical location requirement precludes operation of a marketing outlet that conducts business exclusively over the telephone.

For example, this eliminates the possibility of buying services that offer discounted merchandise operating in conjunction with an 800 number network.

The promotional services now offered through credit card companies are excluded.

The payment of a commission for taking a reservation over personal computer system is foreclosed.

The more subtle form of exclusion at work now in the marketplace involves making it financially unattractive for large firms dealing in related travel, ticketing, or merchandising of services to enter. Every location—except in-plants—must have personnel and managers meeting the ATC requirements. This imposes tremendous costs on companies such as Sears or Ticketron. Indeed, American Express urged us to disapprove the management standards for branch offices. While we did not disapprove that rule, our disapproval of exclusivity affords American Express the flexibility to deal outside the agency system under different standards.

A recurrent theme in some testimony is all the ways that are now available to purchase an air transportation ticket. Actually, there are no significant sellers of air transportation other than air carriers and travel agents. Virtually all the alternatives that have been suggested are various methods of direct sales by air carriers themselves.

When testifying to the House Aviation Subcommittee, sponsors of H.R. 2053 acknowledged that there are unduly restrictive provisions in these agreements that should probably be altered. Transcript July 26, at 45. Because the legislation does not permit the Board to address specific problems that arise, they acknowledged that amandments to define the Board's right to make further changes should be considered. Id. at 47–49.

During the course of those hearings, there were questions about amendments to clarify what activities would be protected from the antitrust laws. The concern was that current immunity was being used as a cover for boycotts of particular carriers. Transcript of July 28 at 45. The so-called "Agent Participation Rule" have antitrust immunity and we cannot assure you that they would not provide a basis for threats of agent retaliatory action.

Thus, even if you sympathize with the travel agents' position, it is clear that S. 764 should not be adopted as it is written.

The Board decision, in contrast, will ultimately offer consumers a way to pay for only what they use.

New ticket outlets could specialize in catering to passengers who know exactly what they want. Those tickets, which would required little effort to write, could be sold at a lower cost. Competition will thus offer consumers a clear gain, through a wider choice of service and price options.

In air travel there will be choices. But the end product—an airline seat—will be the same regardless of how it is acquired.

We are already seeing the first hints of this kind of price competition as high volume agencies are reportedly returning portions of their commissions to selected customers, such a corporations. In essence they are passing on some of the benefits to be gained by their more efficient operations. Since these efficiencies are evidently achievable, it is only a matter of time before that portion of the general public with uncomplicated travel demands will benefit. In the end, all passengers would benefit because of reduced marketing cost to the airlines.

Not all airlines may wish to participate in these merketing schemes. But the point is that their competitors and existing distributors, acting together, should not be able to prohibit the use of other distribution modes.

Prior to the Board's decision the potential price for experimentation was losing the automatic representation of the 22,000 ATC and IATA agents.

This was so severe that no major carrier could afford to experiment with low cost alternatives.

Competition, as allowed by our *CMI* decision, offers the opportunity for clear gains to consumers in a wider array of services and price options. But no airline can be expected to stick its neck out until Congress ends the threat that exclusivity will be reimposed.

The Board's order attempts to fix the system by allowing competition. But it recognizes that there is no need to go back to the beginning and start over again.

A joint system has many benefits. But it is not the only or necessarily the best way to do business. For that reason, the Board freed airlines to set up other distribution methods. Once the needlessly restrictive aspects of the agreements are removed, the joint system of marketing will retain only those features that produce public benefits.

The ATC and IATA travel agency programs will survive if they are subject to the same rules of competition—the antitrust laws—that apply to unregulated industries.

The antitrust laws do not prohibit competitors from engaging in cooperative activity. They merely prohibit competitors from cooperating in ways that have a significant adverse effect on competition. There are dozens of examples of cooperative activities by the airlines going on right now that are not protected from antitrust attack.

One example is the Airline Clearinghouse. It performs essentially the same service as the Area Settlement Plan, except the clearinghouse settles accounts between air carriers, rather than between agents and air carriers. It has operated without immunity since its inception in the 1940's.

ASTA maintains that the Airline Clearinghouse, which has never enjoyed immunity, is distinguished from the ASP, which does. ASTA offers a distinction without a difference. The fact that the Clearinghouse is a mechanism to settle accounts between air carriers, rather than between carriers and agents, means nothing. July 28 Transcript at 85. Both set fixed reporting and remitting schedules, which is the basis of ASTA's concern. Yet the Airlines Clearinghouse has operated without immunity since its inception in the 1940's. If anything, a settlement agreement among horizontal competitors—the airlines—would be more vulnerable to legal attack under per se theories, yet none has materialized.

Another example from the airline industry involves the Consolidated Air Tour Manual. CATM lists tours, generally combined accommodation and transportation packages, in a consolidated listing of available programs. That program is now operated without immunity. In fact, the only lawsuit we could find involving CATM occurred when it was immunized. In *E. A. McQuade Tours, Inc.* v. *Consolidated Air Tour Manual Committee,* 467 F.2d 178, 188 5th Cir. (1972) the court upheld the imposition of reasonable integrity and responsibility standards.

Another particularly relevant example involves agreements by which commuter airlines affiliate themselves with a certificated carrier, use that carrier's name, offer integrated schedules, and enter into special operational arrangements that are much more extensive than interlining. An example of this kind of agreement is the Allegheny Commuters agreement. In Order 79-2-108, the Board concluded that there was nothing inherently anticompetitive in these arrangements and therefore proposed to withdraw antitrust immunity after two years, which allowed time for modifications to eliminate antitrust concerns. We modeled our action in the *CMI* on this experience.

Parties in the *Allegheny* case had argued that the agreements were anticompetitive and that carriers would not enter into beneficial interline arrangements in the absence of antitrust immunity. These dire predictions were proven false by subsequent events. Commuter agreements are now a common occurrence. We are not aware of any antitrust lawsuits challenging them.

Other airline joint cooperative ventures that do not have antitrust immunity include the Universal Air Travel Plan (Order 80-6-66), a clearinghouse for spare parts, and a consolidated cargo pick-up and delivery service in the United States (Order 81-11-121). Every time the Board proposed lifting immunity—as it did in the cited cases—we heard the argument that antitrust immunity was essential. But if carriers really want to engage in a particular activity, they will find a way to do it.

Among the other cooperative activities that do not have immunity are the real estate multi-listing services, the various wire services, sports leagues, such as the Professional Golfers' Association and the National Football League, and trade associations that routinely facilitate legitimate information dissemination and industry standardization.

The conferral of immunity is the exception, not the rule.

Dozens upon dozens of cooperative activities go on without it every day.

Persons who engage in them, including airlines and agents, run the risk of being sued for treble damages, but it is a risk they accept and deal with.

You may be told the agency system will collapse unless antitrust immunity is retained. But that is simply not true.

No airline can afford to give up its primary distribution system. No airline is going to abandon the source of over 60 percent of its revenue before a lawsuit is even filed.

The fact is that the airlines can—if they are willing—design conference programs that comply with the antitrust laws.

If a system basically works, its participants will value it highly enough to provide for its continuation, even if that requires some change in form. The function will be performed by someone in a competitive marketplace. The Area Settlement Plan is now administered by several banks under contract to ATC. The Board believes that ATC could continue to perform this role. But these banks could just as well take over and enforce standards for participation in joint settlement, which accounts for the most pronounced efficiency gains of the accreditation programs. In fact, Eastern Airlines was able to dispose of its interest in the Puerto Rican area settlement plan to a travel management service which has administered the program without antitrust immunity. This would also be analogous to the situation in which the Donnelly Company's acquisition of the Consolidated Air Tour Manual.

In view of the substantial benefits of the conference programs and the Area Settlement Plan, airlines will not abandon the system because of the threat of unjustified, frivolous lawsuits. In fact, a major airline executive recently came to the very same conclusion. John Zeeman, senior vice president for marketing of United Airlines recently responded to a series of questions of immunity as follows:

"Q: Looking at the marketing case implications, we could be less than two years away from the elimination of antitrust immunity for a number of things starting with the agency program itself. If the immunity goes away and the ATC and IATA agency programs as such go away, what does that do to the way you distribute the product?

"Zeeman: As I said previously, very little. Because as far as we are concerned, we are going to continue to operate through travel agencies. My personal feeling is that the area settlement plan is here to stay.

Q: With our without immunity?

"Zeeman: With or without immunity. It is not an anticompetitive operation. I think it would pass any strain that the Justice Department would put on it.

"Q: It has been suggested, though, that carriers would abandon it if they lost the umbrella of antitrust immunity.

"Zeeman: There may be some that would. I doubt it. I think that from our evaluation of that system it will pass any screen.

"And I think most other carriers will come to the same conclusion and they will realize that it is a very effective way for both the airlines and the agencies to conduct their business. I don't see that going away with or without antitrust immunity.

"The same thing I would say of interlining in terms of baggage. The basic way that the airline industry conducts its business, I think, would be retained with or without antitrust immunity." (Travel Weekly, May 16, 1983, at 8.)

Protection from the antitrust laws is extraordinary relief, not available to most business. Although I cannot deny that frivolous lawsuits can happen, the proper remedy is not to pass out immunity to a few favored industries. There have been suggestions about improving the antitrust laws to discourage truly frivolous suits and that would seem to be the better way to respond to these concerns.

Just last June—in the computer reservatioons hearings—people were telling the House Aviation Subcommittee that meritorious lawsuits are too expensive to bring. These are largely contradictory positions.

Regulation never fully protected airlines from frivolous or meritorious lawsuits, some involving antitrust issues. Yet airlines did not stop entering into contracts, hiring employees, or flying altogether because of the chance of litigation. Presumably, they tailored all their behavior in these areas to cut down on the chance they would ultimately be found liable.

The truth of the matter is that the argument about both the costs and the risks are greatly exaggerated.

Advocates of retaining immunity tend to exaggerate the risks.

For example, in early merger cases parties advanced all sorts of theories about frivolous lawsuits to persuade the Board to grant discretionary antitrust immunity after review under section 408 (This statute is substantially similar to section 412 governing agreements).

The Board declined; no one sued.

In the House Aviation Subcommittee hearings on this legislation ASTA asserted that the Area Settlement Plan would be found unlawful on the basis of the case of *Catalano, Inc.* v. *Target Sales, Inc.*, 446 U.S. 643 (1980). In *Catalano* a group of competing beer wholesalers secretly agreed to eliminate competition among themselves in the extension of credit on sales to retailers.

We cannot respond to this argument more effectively than ASTA did in its briefs in the *Marketing* case.

"[T]he purpose and effect of the agreement in *Catalano* bears no relation to the ASP. Unlike the *Catalano* situation, where the conspiring wholesalers agreed to terminate credit entirely and the plaintiff retailers were given no means to seek varying settlement terms with individual wholesalers, the ASP does not entirely eliminate the implicit credit to agents or competition among carriers for agent patronage on the basis of price or individual settlement terms." (ASTA Brief to the ALJ at pages 89-90, January 18, 1982. See also ASTA's Brief to the Board, Appendix C pages 9-10, July 28, 1982.)

We looked at *Catalano* and the other cases in this area and concluded ASTA's interpretation was correct. Order 82-12-85 at 101-05.

ASTA is also arguing that with antitrust immunity removed carriers will withdraw from the agency programs because recent cases make the legality of any industry-standards doubtful. ASTA's position is untenable. As ASTA indicated in its brief to the Board, "collective setting of qualification standards is a feature of many industries and has been approved by antitrust authorities." Brief at 42. We need not cite the innumerable cases that stand for this proposition. We will merely attach as an appendix the eight pages of citations ASTA gave us. Appendix J.

ASTA cites the case of *American Society of Mechanical Engineers* v. *Hydrolevel Corp.*, 102 S. Ct. 1935 (1982) in support of its new position. That case merely illustrates why it is so important that antitrust laws apply to trade association activities.

The American Society of Mechanical Engineers promulgates codes for engineers and industry. These were not at issue in the case. In *Hydrolevel*, the facts disclosed that McDonnell & Miller, Inc. (M&M)—a firm marketing safety valves for water boilers—solicited a letter from ASME asking whether its competitor's design was safe. The response was prepared by M&M employees who served on the ASME technical advisory subcommittee. The same persons had prepared the inquiry.

Their response was that the Hydrolevel safety valve design was unsafe, despite the fact that there was no basis for that conclusion. The letter was then widely disseminated by M&M in an effort to discourage customers from purchasing the Hydrolevel device. Hydrolevel was driven out of business. The Court found that ASME should be held liable for the fraudulent acts of its agents.

The opinion does not impugn objective industry standards. Rather, antitrust liability resulted from ASME's role in allowing anticompetitive use of the trade association process to injure a single competitor.

This result could easily have been avoided if ASME had monitored its members' trade association activities. Perhaps its laxity is explained because it thought an association was immune from liability.

By removing immunity, the Board seeks to prevent agents from using ATC or IATA to keep their competitors out of the industry. Reasonable, objective standards for people who wish to operate through ATC or IATA are not threatened by the *Hydrolevel* decision.

ASTA also cites *Radiant Burners Inc.* v. *Peoples Gas Light & Coke Co.*, 364 U.S. 656 (1961), which presents essentially the same facts. There a trade association tested burners and issued a seal of approval for those which passed its tests. The tests were not objective but were influenced by the defendent members of the association which were in competition with Radiant Burners. The Court found that the refusal to approve the burners was entirely motivated by an effort to exclude competition. Nothing in the opinion suggests that the trade association could not promulgate and enforce objective standards for the industry.

Both the *Hydrolevel* and *Radiant Burner* cases involved situations where the purpose of trade association activity was to coerce certain competitors in the industry, stifle innovation or destroy competition. Where this purpose is found, a group boycott exists, and a summary finding of illegality is in order.[1]

ASTA's use of cases where the clear purpose and intent was to eliminate competition suggests that they may be seeking immunity to protect unreasonable exclusion of competitors. If antitrust immunity is not withdrawn, they will have the means as well as the incentive to accomplish this purpose.

The antitrust laws are not vague or arbitrary as ASTA would now have you believe.

Even if a business is concerned about the laws, it can seek antitrust counseling to reduce the risk of lawsuits. The Justice Department will, upon request, review proposed business activity to remove uncertainty about its enforcement intentions.

Indeed, a spokesman for the Justice Department has already indicated that if ATC and IATA recast the agency provisions along the lines suggested by the CAB, DOJ would see no antitrust problem.

The non-obtrusive structure of the antitrust laws is more efficient than government regulation. The antitrust laws permit companies to monitor their own behavior so that the government need not intervene, except when there are deviations from competitive standards. The regulatory process which culminates in antitrust immunity is more intrusive because it involves detailed examination and monitoring of industry practices.

---

[1] ASTA cites *U.S.* v. *National Association of Broadcasters*, 536 F. Supp. 149 (D.C. 1982) for the proposition that industry standards are incompatible with the antitrust laws. In that case only one of several industry trade association standards was found unlawful. That provision precluded the advertisement of more than one product in a commercial lasting less than 60 seconds. The purpose and effect of the provision was to artificially increase the demand for commercial advertising time. The Court found that the effects of the rule were most keenly felt by small enterprises who could not advertise more than one product in, for example, a thirty second commercial. Again nothing in the case supports the suggestion that general industry standards that are promulgated without the purpose or effect of reducing competition and are objectively administered are unlawful.

A mere reading of the plain language of a rule or the lofty public interest justifications offered by its advocates may not disclose any apparent competitive problem. The antitrust laws permit people to prove that the reality is different than the appearance. The grant of antitrust immunity is made largely on the basis of surface perceptions, which can be very misleading.

The Board's decision to approve accreditation cannot be viewed in islolation from the decision to withdraw immunity.

In essence, the Board said that the financial accreditation standards and ASP were not unreasonable on their face. As long as these rules are interpreted and administered to satisfy legitimate, procompetitive goals, they can be approved.

But the withdrawal of antitrust immunity is what ensures that the programs will be administered positively for the good of consumers.

Consider who is interpreting and administering the rules. Do airlines and travel agents have natural incentives to promote competition? Sometimes it is in ATC's interest to attempt to restrict travel agent competition with airlines for retail sales; other times, it is in the interest of ATC and the travel agent organization to foreclose outside competition. (ASTA and ARTA are entitled to participate in ATC deliberations and communicate their views to airlines).

The benefit of the Board's approach is that the possibility of antitrust liability should cause ATC and IATA to ensure that the rules and the enforcement of these rules do not improperly restrict competition. That is the same incentive that keeps other cooperative ventures honest. But if the industry is immune, competition will inevitably be restrained.

Antitrust lawsuits do not materialize out of thin air. Air carriers will be put on notice, through their dealings with the potential litigant, that the person feels that he has been unreasonably injured by conference action. In those dealings the conferences would be obligated, as most other businessmen are, to consider the legitimacy of the person's grievances. Where they appear to be well-founded, carriers would presumably re-examine the provision to determine whether the interest they seek to protect is of such consequence that they should risk the possibility of an adverse judgment.

If the injured person can be easily accommodated, and they frequently can be accommodated, the removal of antitrust immunity creates substantial incentives to do so. An antitrust challenge could only materialize after carriers had the opportunity to consider the injured person's objections, and rejected them.

The grant of antitrust immunity has both economic and social costs. It obviously costs airlines a lot of time and money.

Regulation creates costs for the government, and ultimately the taxpayer.

Antitrust immunity requires the government to review each agreement closely, since there is no private remedy. The Board must devote many hours to reviewing these agreements. Between 1951 and 1979 ATC amended its basic passenger agreement 250 times. Since 1979 ATC has submitted more than 60 amendments to the passenger agency agreements at issue in the Marketing case.

The review process is a difficult one.

The Board cannot always predict with accuracy how an agreement will be implemented and what its effects in the marketplace will be. Air carrier parties to the agreement themselves frequently are not able to predict their effects.

An example from the air carrier ticketing agreements demonstrates this.

Last December the Board approved an agreement which it and vitually all ATC carriers believed to be desirable. It attempted to address the problem of travel agents ticketing around certain carriers by re-establishing a plating priority.

ATC stated that the rule required agents to name the carrier that was selected to provide transportation as the ticketing carrier. Only if the agent was not authorized by the transporting carriers, could the agent name the carrier whose computer they used as the ticketing carrier.

American and United interpreted the provision differently so that they could be named the ticketing carrier in all instances. They apparently used the agreement to obtain the benefit of "ticket float"—that is the use of the money from the ticket for the 60 to 90 days between ticketing and the time the transporting carrier made a demand for their money. Also, some CRS carriers collect fees from other airlines if their CRS was used to issue a ticket.

This was not contemplated by the majority of ATC carriers or the Board. At the Board's instruction, the agreement was modified to address this problem.

Now it appears that CRS carriers are programming their systems to automatically name themselves as the ticketing carrier whenever they are on the itinerary, despite the prior practice of naming the first transporting carrier as the ticketing carrier.

We also must assume fair and impartial application of the standards. In fact, they are often applied rigidly or arbitrarily. See Appendix C, page 10. Just recently the ATC travel agent commissioner decided that a person with 14 years ticketing experience did not meet the ticketing experience requirement because the last three years had been spent in an inplant location, rather than a fully accredited location or branch. This decision is attached as Appendix K. Recently, an amendment that would effectively repeal this result and adopt a Board suggestion in the *CMI* was rejected by the ATC committee, even though it had received some support. See Appendix C, page 8.

If conference carriers want to exclude certain persons from the programs, they can fashion a means to accomplish that result even from innocuous sounding agreements. For example, ATC recently filed amendments to its resolutions it says conforms those resolutions to our exclusivity decision. Some of the challenged amendments involved modifications to the standard interline agreement and provisions governing standard ticket stock. The Department of Justice, American Express and the National Passenger Traffic Association see the changes as just another means to preserve the agent monopoly.

In their revisions ATC also included a requirement that airlines withdraw their individual ticket stock from an agency if ATC withdraws standard stock, despite the fact that we have repeatedly disapproved similar provisions in the recent past.

Granting immunity requires the Board to continue to arbitrate disputes in the industry.

Agents often ask us to disapprove existing agreements because they believe they are too onerous. A list of such actions is attached as Appendix B. In the *Marketing* order, we disapproved the IATA airport restriction, and substantially revised the ATC personal guarantee rules. Travel agents are not complaining about these procompetitive actions.

There would probably be more appeals for further liberalization if agents or excluded entities were aware that they could ask the Board to reconsider its approval of the standards. Many would-be agents are told by ATC staff that the Board's approval and grant of antitrust immunity to an agreement precludes any form of legal challenge, even though a reexamination of prior approvals is implicit in the Board's oversight.

Changes in the past have come almost entirely because of periodic Board investigations. In fact, many unnecessary and stringent restrictions were dropped after the *Marketing* case was instituted. S. 764 might well be read to preclude this process, thus casting the existing system in an unchangeable mold.

Unlike the Board, which can grant exemptions to promote competition or advance the public interest, the ATC only has the power to apply the rules. The rules themselves cannot be changed without either a majority vote or unanimous approval of the carriers depending on the type of resolution being considered.

There has been some suggestion that S. 764 is true deregulation because airline marketing decisions would be totally immune from administrative and judicial review. If this were true airlines and travel agents could dictate the terms on which consumers purchase tickets. It would create a tremendous potential for abuse. No industry is free from some type of accountability. Deregulation contemplates accountability under the antitrust laws.

The immunity issue is not a question of avoiding costs. The costs of a regulatory system are high. It is really a question of whether self-regulation, disciplined by the laws of competition, serves the public interest better than administrative oversight.

Neither system is perfect.

But it is the considered judgment of the Board, weighing the facts, law, and national aviation policy, that regulation comes in a poor second.

You might hear arguments that the Board has ignored the intent of Congress by ending antitrust immunity for the agency agreements. There is no support for the claim that the Board has in effect repealed § 414 of the Act.

The Board was instructed by Congress in section 1601(c) to review and report on all its grants of antitrust immunity. This indicates the Congressional intent that the Board, in a programatic approach, review all agreements filed prior to the Airline Deregulation Act. ASTA urged such a reappraisal. (See Appendices H and I.) And in testimony to the Senate Aviation Subcommittee in 1981, ATA argued that Congress should repeal the Board's power to approve and immunize agreements affecting domestic air transportation after a five year transition period.

The report on the ADA indicated some types of agreements that Congress considered to be unacceptable, some that were considered benign, and some that the Board was to take a hard look at. The agency agreements fall into the last category S. Rep 95-631 at 81-82, February 6, 1978.

The fact that the Board has selectively withdrawn immunity is not tantamount to a repeal of section 414. There are a number of outstanding approvals with immunity. Significantly, there are also instances when the Board has granted discretionary antitrust immunity. For example, the Board has granted immunity to the Default Protection Program.

Finally, I'd like to address the claim that the Board has disregarded U.S. foreign aviation policy and the views of the Department of State in its decision.

It is somewhat anomalous that U.S. foreign policy is being championed by foreign airlines. The Department of State has ways to make its feelings known if it objects to the Board's decision, but DOS did not petition for reconsideration.

The Department of State did forward communications it received from foreign governments. It also urged the Board in a letter early in the proceeding not to take actions which would deny foreign carriers equal access to U.S. traffic. The principal concern seemed to be the IATA common accreditation program, not exclusivity or antitrust immunity.

The CAB did not disturb the accreditation program.

We feel we have been responsive to State's concern.

Foreign airlines have nevertheless complained that the Board's decision denied them fair and equal access to U.S. markets. This argument assumes that only captive outlets will emerge, and that foreign carriers would be financially incapable of supporting their own outlets.

At the very least, it is somewhat premature to object given the improbability of captive agencies. Even if U.S. carriers set up their own outlets, no U.S. carrier has international operations of such scope that they would benefit from prohibiting sales on foreign carriers. Airlines now have their own city ticket offices where they gladly sell tickets not only for foreign carriers but also for their domestic competitors. The reason is relatively simple: they can make money off a sale and lose nothing if they do not compete in that market.

U.S. carriers are often discriminated against or even excluded in foreign countries' distribution systems. It is particularly inappropriate for some of them to contend that "fair and equal access" gives them the right to say how tickets will be sold by all airlines in the U.S.

Despite the occasional inequities, however, the Board has pledged that it will protect foreign carriers' ability to market their services in this country fairly and equally.

Should circumstances call for Board intervention to uphold U.S. bilateral obigations, the Board is fully prepared to step in.

But preservation of the restrictive and exclusive IATA agency agreement on the small chance that changes would affect our bilateral obligations would be letting the tail wag the dog.

To sum up, S. 764 would abrogate accepted administrative procedures, reverse the policy of airline deregulation, and injure consumer interests.

When it comes to selecting between the economic good of the many and the narrow interests of the few, we as Americans have generally rejected the idea of special treatment.

CHART NO. 1—THE EXPLOSIVE GROWTH OF TRAVEL AGENTS

AGENCY LOCATIONS ON ATC AGENCY LIST AND ANNUAL CHANGES

Year end	Number on list	Included in following year	Percent increase	Deleted in following year	Net increase	Net percentage increase
1958	2,871	434	15.1	47	387	13.5
1959	3,258	750	23.0	69	681	20.9
1960 [1]	3,939	577	14.6	109	468	11.9
1961	4,407	437	9.9	141	296	6.7
1962 [2]	4,703	594	12.6	187	407	8.7
1963	5,110	516	10.1	140	376	7.4
1964	5,486	[3] 374	6.8	[3] 230	144	2.6
1965	[3] 5,630	520	9.2	178	342	6.1
1966	5,972	539	9.0	249	290	4.9
1967	6,262	578	9.2	149	429	6.9
1968	6,691	632	9.4	204	428	6.4
1969	7,119	770	10.8	212	558	7.8
1970	7,677	790	10.3	258	532	6.9
1971	8,209	1,061	12.9	143	918	11.2

CHART NO. 1—THE EXPLOSIVE GROWTH OF TRAVEL AGENTS—Continued

AGENCY LOCATIONS ON ATC AGENCY LIST AND ANNUAL CHANGES

Year end	Number on list	Included in following year	Percent increase	Deleted in following year	Net increase	Net percentage increase
1972	9,127	1,272	13.9	193	1,079	11.8
1973	10,206	1,395	13.7	205	1,190	11.7
1974	11,396	1,396	12.2	355	1,041	9.1
1975	12,437	1,582	12.7	358	1,224	9.8
1976	13,661	1,718	12.6	326	1,392	10.2
1977 [4]	15,053	1,939	12.9	364	1,575	10.5
1978	16,628	1,965	11.8	472	1,493	9.0
1979	18,121	1,602	8.8	375	1,227	9.6
1980 [5]	17,339	2,248	13.0	384	1,864	10.8
1981	19,203	2,363	12.3	604	1,759	9.2
1982	20,962					

[1] "Need" clause eliminated.

[2] Bond requirement instituted.

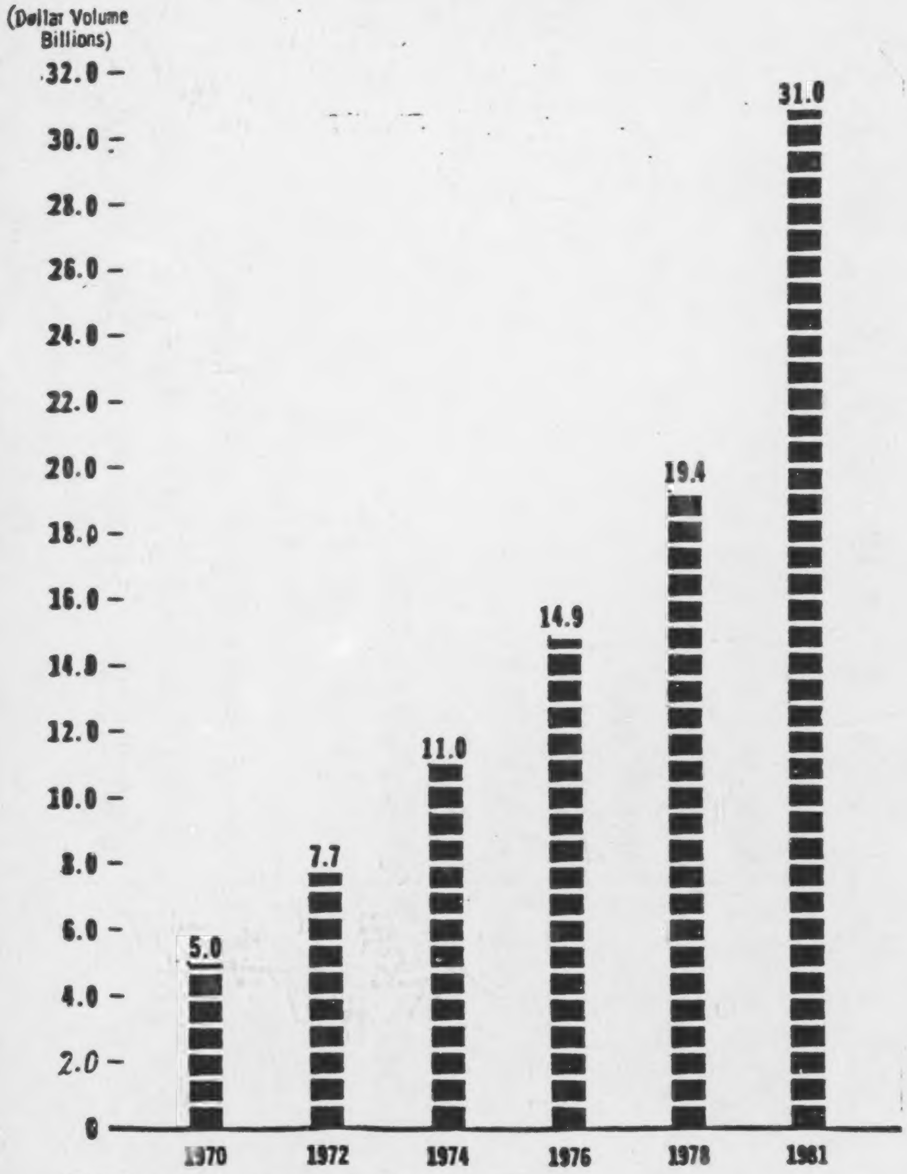
[3] Number of agents on list, as of Dec. 31, 1965, counted by computer for first time. The additions and deletions processed during 1965 had to be adjusted to reflect a decrease of 152 agency locations from a manual total count of 5,782 in order to coincide with the computed count of 5,630.

[4] Began 1977 with implementation of travel agent commissioner and discontinuance of agency committee reviews of U.S. agent/applicants.

[5] Effective Oct. 1, 1980, Canada was removed from the ATC program. The figures are based on U.S. agents only.

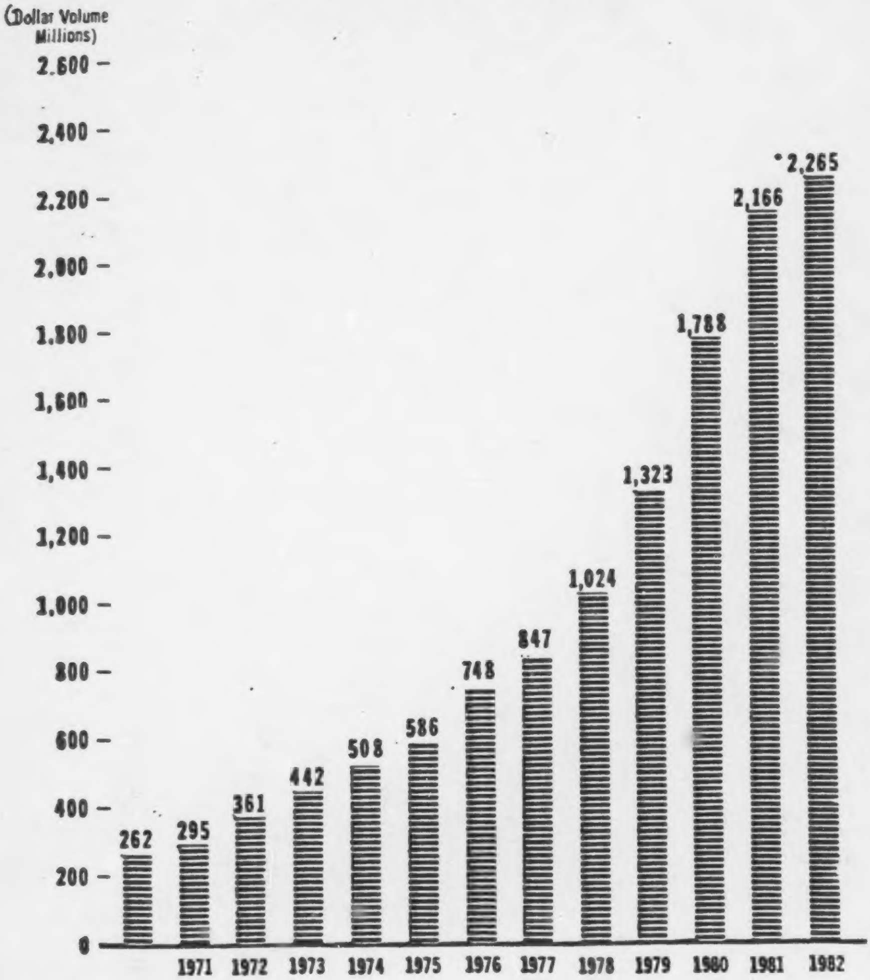
Source: Travel Weekly's 25th anniversary issue, page 80, May 31, 1983.

CHART No. 2. **TRAVEL AGENTS HAVE EXPERIENCED UNPRECEDENTED GROWTH AND PROSPERITY**



SOURCE: Travel Weekly's Louis Harris Study May 1982

CHART No. 3. TOTAL TRAFFIC COMMISSIONS

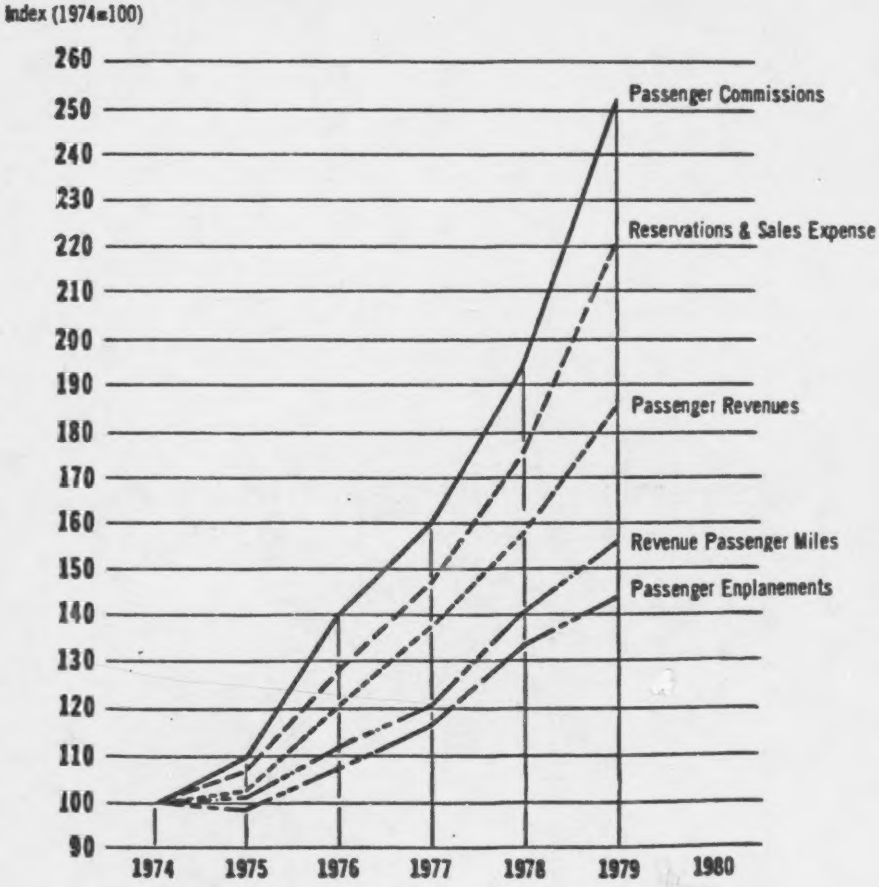


SOURCE: CAB Form 41 data

*12 Months ended 6/30/82

CHART No. 4.

DOMESTIC TRUNK AND LOCAL SERVICE CARRIERS' PASSENGER COMMISSIONS AND RESERVATIONS & SALES EXPENSES ARE INCREASING MORE RAPIDLY THAN REVENUE AND TRAFFIC



SOURCE: CAB Docket 36595
Exhibit TKTN-101
Page 1 of 1

CHART No. 5. PRINCIPAL ELEMENTS OF AIRLINE OPERATING EXPENSES
Majors and Nationals

Labor	1972	1981	1982
Total Cost ($millions)......	4,627	12,384	12,511
Average Number of Employees	295,684	340,081	319,225
Average Compensation ($)....	15,650	36,414	39,193
Percent of Total Operating.. Expenses..........	46.8	34.8	35.3

Fuel	1972	1981	1982
Total Cost ($millions)......	1,189	10,461	9,674
Gallons Used (millions).......	10,195	10,041	9,834
Avg. Cost Per Gal. (¢)..........	11.7	104.2	98.4
Percent of Total Operating.. Expenses..........	12.0	30.4	28.1

Traffic Commissions	1972	1981	1982
Total Cost ($millions)..........	342	2,063	2,214
RPM's (billions)......	164	251	261
Cost Per RPM (¢)......	0.209	0.821	0.850
Percent of Total Operating..... Expenses.............	3.6	5.8	6.2

Passenger Meals	1972	1981	1982
Total Cost ($millions).....	390	993	1,015
RPM's (billions).......	164	251	261
Cost Per RPM (¢)...	0.238	0.395	0.390
Percent of Total Operating Expenses	3.9	2.8	2.9

Landing Fees	1972	1981	1982
Total Cost ($millions)......	257	585	593
Aircraft Capacity Tons Landed (millions).......	98	106	106
Cost Per Ton Landed ($)........	2.63	5.50	5.60
Percent of Total Operating Expenses	2.6	1.6	1.7

Advertising & Promotion	1972	1981	1982
Total Cost ($millions).........	264	623	731
RTM's (millions).....	22,782	32,536	33,308
Percent of Total Operating Expenses............	2.6	1.8	2.1

Total Operating Expenses	1972	1981	1982
($millions)........	9,885	35,583	35,468

Interest	1972	1981	1982
Interest on Debt ($millions)......	344	1,292	1,431
Average Debt Outstanding ($millions)......	5,950	12,325	13,584
Average Book Interest Rate (%)	5.8	10.5	10.5
Percent of Total Operating Expenses........	3.5	3.6	4.0

Maintenance Materials and Other Costs	1972	1981	1982
Total Costs ($millions)......	2,402	6,870	7,083
Percent of Total Operating Expenses...........	25.1	19.3	20.0

Total operating expense includes interest on debt less depreciation and amortization.
ATA Chart

BEST COPY AVAILABLE

CHART NO. 6—TRAFFIC COMMISSIONS AND OPERATING REVENUE, TOTAL CERTIFICATED INDUSTRY

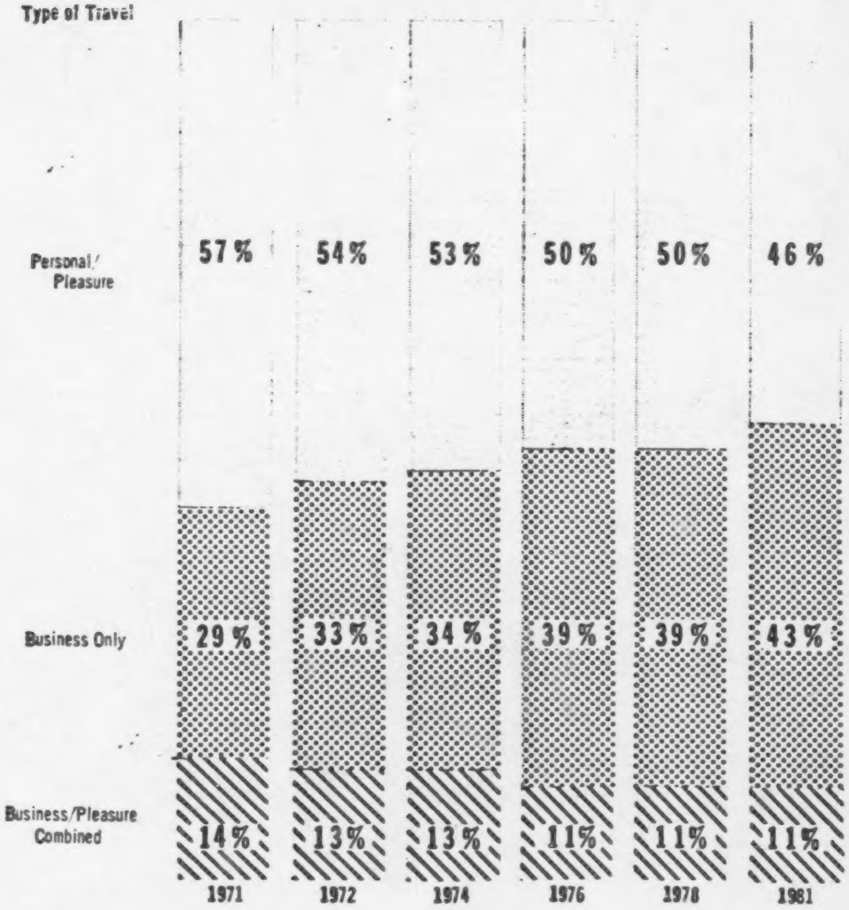
[Dollars in millions]

Calendar year	Operating revenue	Total traffic commissions	Traffic commissions as a percent of operating revenue
1970	$9,289.7	$262.0	2.8
1971	10,045.6	294.9	2.9
1972	11,163.3	360.9	3.2
1973	12,418.8	442.1	3.4
1974	14,703.2	508.6	3.5
1975	15,356.3	586.2	3.8
1976	17,505.6	745.7	4.3
1977	19,926.4	847.9	4.3
1978	22,892.1	1,024.5	4.5
1979	27,227.0	1,322.9	4.9
1980	33,727.8	1,788.0	5.3
1981	36,502.2	2,166.3	5.9
1982 [1]	36,235.0	2,264.6	6.2

[1] 12 months ended June 30, 1982.

Source: CAB Form 41 data.

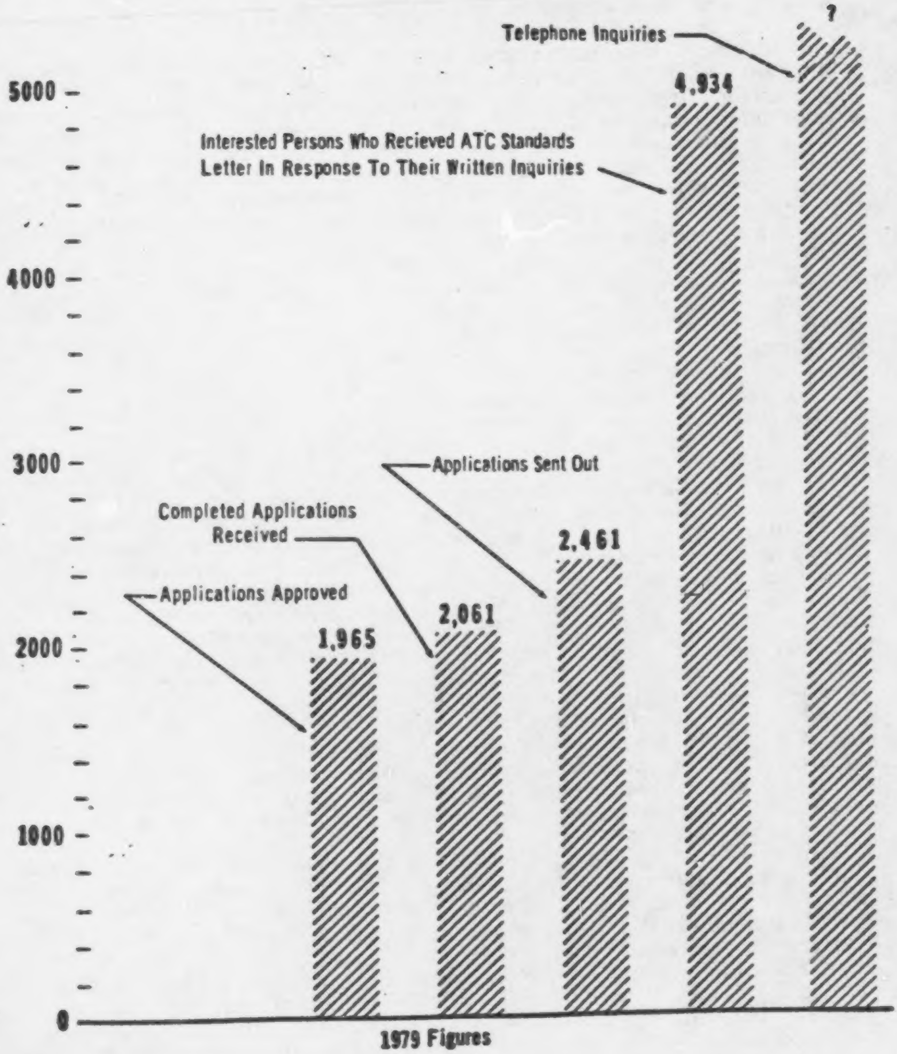
CHART No.7. **BUSINESS TRAVEL IS AN INCREASINGLY IMPORTANT PART OF AGENT'S SALES**



SOURCE: Travel Weekly's Louis Harris Study May 1982

BEST COPY AVAILABLE

CHART No. 8. THE NUMBER OF FORMAL APPLICATIONS DENIED DOES NOT REFLECT THE ACTUAL NUMBER OF PERSONS THE ATC RULES KEEP OUT OF THE INDUSTRY



SOURCE: ATC-T-1 at 54

QUESTIONS OF SENATOR INOUYE AND THE ANSWERS THERETO

Question. It has been said that the Board's decision does not affect the present "primary distribution system," i.e., ATC accredited travel agents. But the heart of that system is the antitrust immunity for the ATC agency program and the Area Settlement Program (ASP). That immunity ceases on December 31, 1984. What happens if the Department of Justice acts after that?

Answer. The short answer is that DOJ will assume the same responsibilities it has in other unregulated industries.

The existing ATC agency program and the ASP have operated with antitrust immunity since their inception in the 1940's and 1950's, respectively. Antitrust immunity precluded anyone who might have been injured by ATC's handling of its programs from pursuing relief through the courts. Similarly, the Department of Justice could not independently challenge conduct through the courts. What that has meant is that the Board had the sole power to ensure that the agreements were fair and that they were not used in a manner that substantially reduce competition.

In the Marketing case the Board examined programs and found that they were fair and not anticompetitive, except for certain specified provisions such as exclusivity. In our judgment, then, there would be no legally sound basis to challenge the provisions of the ATC accreditation program or the ASP that the Board approved if immunity was withdrawn. Virtually all the parties to the proceeding, including ASTA, ARTA, ATC, IATA, and DOJ agreed with that conclusion in their briefs to the Board. Meritorious lawsuits are, therefore, highly unlikely.

By removing antitrust immunity the Board has made the antitrust laws the primary guarantor that the programs will be operated in a fair and competitive manner just as they are in all other industries. Both DOJ and private individuals will have the opportunity to go to court to stop arbitrary application of existing rules or future amendments to the agreements that are unfair or anticompetitive.

One point should be made at this juncture. Antitrust lawsuits do not materialize out of thin air. Air carriers will be put on notice, through their dealings with a potential litigant, including DOJ, that some persons feel that they have been unreasonably injured by conference action. In those dealings the conferences would be obligated, as most other businessmen are, to consider the legitimacy of the grievances. Where they appear to be well-founded, it would be incumbent upon air carriers to make some accommodation. Frequently, such grievances may be easily remedied and the removal of antitrust immunity would create substantial incentives to take such action. An antitrust challenge could only materialize after carriers had the opportunity to consider the injured person's or DOJ's objections and rejected them.

Question. Do the present requirements for accreditation by the ATC really keep anyone who is really serious and financially responsible from being accredited?

Answer. Yes; they do. In my formal testimony I set out four concrete, innovative ideas that were specifically discussed in the *Marketing* hearing that might have promoted air transportation, increased marketing efficiency, and saved many consumers and airlines money.

Ticketron, for example, believed that it had a better idea. It wanted to save both airlines and consumers money by selling simple, point-to-point tickets through its outlets at some 650-plus locations throughout the country.

Airlines could not use it without giving up the benefits of common agents, because of exclusivity and other rigid rules.

American Express decided it could compete better if it could set its own company standards for managers at its 125 travel sales locations throughout the country, while still maintaining its responsibilities to the airlines and the consumer.

It could not enter into special arrangements with air carriers because variations on the common personnel standards were not permitted.

Hotels-Autos-Tour-Air (HATA) wanted to be compensated for booking reservations over the telephone, in conjunction with the translation services it provided foreign visitors. When it approached American Airlines, American said HATA could not be compensated because of the exclusivity provisions.

Airline Tickets by Banks (ATBB) felt that automatic ticketing machines for simple transactions, placed in banks, would be profitable as well as reduce costs to airlines and consumers. This idea also did not pass muster under the strict rules of the conference agreements.

In addition airlines will not have the freedom to use untold innovations if the Board's decision is reversed. For example, consider—

Direct sales through computers in business or homes, where the seller is compensated for taking the reservation;

Ticketing machines placed by agents in remote locations;

Sales outlets that are open only on weekends or in the evenings; and

Sales outlets that only do business over the telephone.

These are lost opportunities. They may never work, or they could work well.

But they have been judged inadequate by competitors, not consumers. This is not a theory or philosophy—it is fact. The reasonable conclusion to draw from these facts is that individual airline innovation is severely stifled because of an exclusive system of marketing. New ideas simply do not have an opportunity to take root.

Question. Travel agents will have to play by one set of rules, i.e., the rules for accreditation set down by the ATC. But new entrants into the field, who will not be ATC accredited, will not have to play by those rules (they will make arrangements with individual airlines). Won't this put the existing travel agent-airline relationship (i.e., primary distribution system) at a disadvantage?

Answer. In fact, the exact opposite is true. Travel agents will have a substantial advantage over any new entrant.

When a person enters the marketing industry other than as a travel agent, his or her costs may be lower than those of travel agents because he or she will only have to meet the financial and experience requirements an individual air carrier places upon that sales outlet. These may be less stringent than the ATC requirements.

However, he or she will only be able to sell the air transportation of the carriers that have authorized the outlet to sell their tickets. The outlet's revenue will come from just one or a very few carriers, unlike accredited travel agents who are authorized to sell tickets on virtually all air carriers and can thus offer a broader inventory.

The common accreditation system has been successful because consumers have shown a distinct preference for one-stop shopping, as the unprecedented growth of the travel agency industry demonstrates. Passengers want to be able to obtain fare and service information, as well as ticketing and reservations services from a single source. Marketers that limit their sales to services of a few carriers will be unable to serve the wide variety of traveler demands and thus may be at a significant competitive disadvantage vis-a-vis travel agents that serve the wide variety of traveler demands by holding multiple appointments.

This reasoning supports the conclusion of ASTA's witness that travel agents would only lose two percent of their sales if other forms of marketing were permitted. They acknowledged, and we agreed, that the travel agency system would continue because of the substantial services agents provide to the public.

Question. Travel agents, of course, do more than make reservations and sell tickets. They are travel counselors. The traveling public is by and large protected and served quite well. Under the Board's decision, however, since any non-agent marketer could distribute tickets, what protection will the traveling public have?

Answer. The answer to this question must address two different aspects of consumer protection: protection from financial loss and protection from bad travel advice.

With respect to financial loss, consumers will have the same protection if their ticket is written by a new entrant as they would have if it is written by a travel agent. An airline will be financially responsible for any ticket written by either the new entrant or the travel agent. As a matter of law, consumers will always have recourse to the airline for a refund because of the airline's status as the "principal" behind the selling agent. Air carriers will also bear the cost of any ill-will generated by fraudulent ticket sellers. Consequently, airlines have absolutely no interest in turning their retail operations over to people who are dishonest.

Essentially the same factors will prevent air carriers from giving their tickets to incompetents. The airline will bear the cost of any ill-will generated from improper ticketing. Because airlines want to satisfy their customers, they will weed out incompetent marketers.

In addition, consumers themselves will weed out incompetent sellers. Consumers do not forego air travel if they receive bad travel advice. Rather, if they have unpleasant experiences or receive poor service, they will take their business to another marketer. That is what occurs today when accredited travel agents give bad advice.

Senator KASSEBAUM. Thank you.

Mr. Willis.

Mr. WILLIS. Thank you, Madam Chairman. It is a pleasure to be here before the subcommittee to discuss the CAB's decision in the Competitive Marketing Investigation.

It is also a particular pleasure for me to appear for the first time before Senator Pressler, whom I worked together with 10 years ago at the State Department, before we were working on the Competitive Marketing case, of course.

I appear with Susan McDermott of our General Counsel's office. I would like to submit my full statement for the record and simply touch on its highlights.

Senator KASSEBAUM. Thank you.

Mr. WILLIS. The Department's position in the Competitive Marketing Investigation was to urge the Board to disapprove a number of accreditation restrictions which we had concluded unnecessarily limited the variety of retail outlets available to the traveling public. The Board's order basically followed what we outlined as the proper competitive track for marketing in the industry.

The department strongly believes that the direction and thrust of the CAB decision is correct and in harmony with the Airline Deregulation Act of 1978. It follows from the clear policy directive that, absent a showing that competition cannot work, the air travel industry should be open to the operation of market forces.

The Department therefore believes that rules such as the 20 percent rule and the location rule should be eliminated. Furthermore, business travel departments should not be prohibited from making arrangements with a carrier, including the payment of a commission.

We believe that the exclusivity provisions, which effectively foreclose non-carrier marketing of air travel to all but accredited agents, should be eliminated.

In each of these cases, we believe that the competition these changes fosters may expand the variety of retail outlets and result in cost savings to carriers, which in turn may be passed on to the consumer in lower airfares.

While the Department strongly supports the conference system of common accreditation, we do not believe that it is necessary to exclude all other forms of marketing in order to achieve its benefits.

Others have noted that opening up the existing system will bring no real benefits. While we cannot predict with certainty what business practices will emerge, we are convinced that government should not protect one particular kind of commercial arrangement from other possibilities, known or unknown.

We do not support or oppose particular marketing alternatives. We look to the marketplace to make those decisions, and oppose S. 764 because its practical effect would be to foreclose that dynamic.

The Department recognizes the value of the existing conference system, but does not believe that the system will self-destruct if agency exclusivity is disapproved. It is in the airlines' and the travel agents' best interests to maintain standards for the distribution network that make the consumer confident.

There will continue to be a large market for full spectrum, full service interline retail outlets. Carriers are not required to enter into other types of relationships. This will be a decision each will make individually when it serves the interests of the parties involved. And such new relationships as may develop will not mean disuse of full service interline outlets. These retailers satisfy a critical need to the carriers and traveling public alike. We simply do not feel that the unsubstantiated fears and conclusory statements that competition will produce a less desirable marketing system should drive your decision on this legislation.

The Department therefore believes that the final order of the CAB should be permitted to remain in effect, that procedures of the CAB are themselves sufficiently flexible to accommodate such needs as may arise, and that S. 764 should not be adopted.

Thank you, Madam Chairman. That concludes my statement.

[The statement follows:]

STATEMENT OF FRANKLIN K. WILLIS, DEPUTY ASSISTANT SECRETARY FOR POLICY AND INTERNATIONAL AFFAIRS

Thank you Mr. Chairman, the Department certainly appreciates this opportunity to testify on S. 764. This legislation, we believe, has the potential for very adverse consequences in terms of public policy implementation and competition in the commercial air transportation industry.

I think it would be helpful for me to give you a short history of the Department's views on this issue in order for the Committee to more fully understand our strong objections to any legislation of this sort.

When the Civil Aeronautics Board in 1979 set down for investigation the intercarrier agreements which created the existing system for marketing air travel domestically and internationally, it did so within the framework of the pro-competitive mandate of the Airline Deregulation Act of 1978. In the ADA, Congress established a new standard by which the CAB must judge the propriety of granting antitrust immunization to agreements within the industry that had the potential for limiting competition. This new standard required the Board to find that the agreement in question met a serious transportation need and that there was no less anti-competitive alternative to meeting that need.

The CAB competitive marketing investigation (CMI) was constructed to examine five issues: (1) the general system of common accreditation; (2) specific accreditation provisions which prevented certain entities such as business travel departments from qualifying as accredited agents; (3) the so-called "exclusivity provisions" which prevented carriers from paying compensation to anyone but an accredited agent; (4) the area settlement plan, which created a uniform system within which agents could settle accounts with carriers; and (5) the continued need for antitrust immunity.

From the start, the general system of common accreditation and the area settlement plan were strongly supported by most parties and approved nearly intact by the CAB. Under great debate, however, were, first, the provisions which prevented other types of potential retailers from becoming accredited agents; second, the exclusivity provisions; and, third, the need for antitrust immunity.

Several of these provisions, separately and in tandem, acted to diminish competitive entry into the air travel marketing industry. First, certain of the accreditation standards unreasonably prevented otherwise qualified applicants from becoming travel agents. Requirements like the 20-percent rule which prohibited an agent from doing more than 20-percent of its business with itself, and the location rules which required that agents' offices be open full-time and be available to the public, prevented organizations like corporate business travel departments (BTD's) from qualifying as accredited agents. Similarly, as I've said, the exclusivity rules prevented the carriers from paying compensation to anyone but an accredited agent, thus eliminating many potential forms of retailing. One important effect of these proscriptions was that BTD's, an obviously attractive way for corporations to handle their own frequent and complex travel requirements, could not negotiate with carriers for compensation for the travel planning and booking services which they performed—services that carriers would have readily paid for if they had been performed by an agent.

The Department of Transportation's position in the CMI was to urge the disapproval of a number of accreditation restrictions which we concluded unnecessarily limited the variety of retail outlets available to the traveling public. Specifically, we noted that the elimination of the 20-percent rule and the location rules would permit additional competition. Moreover, with respect to business travel departments, we stated that if a corporation and a carrier determine that it is in their mutual economic interest to satisfy the travel needs of the corporation on a commission basis through a corporate travel office rather than through an independent travel agent, they should not be prohibited from doing so.

The Department also opposed the exclusivity provisions which effectively foreclosed the non-carrier marketing of air travel to all but accredited agents. We argued that greater competition among carriers in the manner in which they marketed could expand the variety of retail outlets and result in cost-savings to carriers, which, in the newly competitive aviation industry, could result in lower ticket prices to consumers. While we strongly supported a conference system of common accreditation, it was our view that it is not necessary to exclude all other forms of Marketing in order to achieve its benefits. We believed that carriers should not be permitted to agree not to compete with each other in the area of marketing. DOT also supported continuation of the area settlement plan.

Finally, we advised the Board to continue to grant antitrust immunity to those carrier agreements which the Department believed were necessary for the continued smooth functioning of the system.

After three years of hearings and analysis of submissions, an intermediate recommendation was reached by an administrative law judge. Judge Yoder recommended approval of the entire system of common accreditation and the area settlement plan, which was in accordance with the Department's views. He found, however, that competition might produce a *less* desirable marketing system than the industry has today, and thus recommended continuing the "agency exclusivity" provisions—that is, continuing the requirement that any retailer acting as an agent for a carrier must be accredited by the U.S. Air Traffic Conference or the International Air Transport Association. Further, the ALJ would have continued the accreditation restrictions and in-plant requirements which had prevented other types of distribution such as business travel departments from qualifying as accredited agents. Finally, the ALJ's decision would have immunized all approved agreements from the antitrust laws.

The CAB chose a different course. The Board approved the agreements which governed the basic framework of the existing travel agent accreditation system and the area settlement plan. It disapproved, in a phased timetable, the exclusivity provisions and the disputed accreditation rules.

The Board also found that the agreements which it approved (that is, those governing the general accreditation program and the area settlement plan) were basically not anti-competitive and therefore, did not require a continuing grant of immunity. Nevertheless, to allow carriers and agents time to adjust their relationships with one another, the Board continued the existing immunity for two years with the possibility of reviewing it again before its expiration.

Although the Board's order differed from the Department of Transportation's recommendation on the antitrust immunity question, it basically followed what we outlined in our pleadings as the proper competitive track for marketing in the industry. Indeed, the Department had recommended that increased competition be put on an even faster track by immediate disapproval of both the exclusivity provisions and those provisions which limited the types of outlets which could be accredited. In contrast, the Board deferred until 1984 disapproval of both these provisions.

The Department believes that the direction and thrust of the CAB decision was correct and in harmony with the Airline Deregulation Act of 1978. It follows directly from the clear policy directives that, absent a showing that competition cannot work, the air travel industry should be opened to the operation of market forces.

Some may argue that opening up the existing system will bring no real benefits. We do not believe that government should be in the business of protecting one class of competitors from known or unknown competitors. DOT does not support or oppose particular marketing alternatives. We look to the marketplace to make those decisions and oppose S. 764 because its practical effect would prevent that dynamic.

The Department recognizes the value of the existing conference system, but does not believe that the system will self-destruct if agency exclusivity is disapproved. It is in the airlines' and travel agents' interests to maintain standards for the distribution network that consumers can have confidence in. There will continue to be a large market for full spectrum, full service, interline retail outlets. It makes economic sense for the carriers to maintain and participate in such a system, despite the existence of marketing alternatives. If the exclusivity requirement is removed, the use of alternatives is wholly permissive—not mandatory. Carriers do not *have* to enter into any other type of relationship; if they do, it will not bear upon the conference relationship already established. There simply is no nexus which inextricably bonds exclusivity to the continued operation of an air transportation retailing system.

It is our belief that the effects of this legislation would be antithetical to the procompetitive goals established for the passenger air transportation industry in the ADA. The CMI record offers numerous, unsubstantiated fears and conclusory statements that competition will produce a less desirable marketing system. Those unsubstantiated fears are simply insufficient to justify a continuing grant of antitrust immunity to the anticompetitive, exclusivity provisions of a generally sound conference system which will in large part continue effectively without them. Nor do these fears justify the creation, through this legislation, of a statutory exception to our economic system's central organizing principle of reliance on competitive market forces.

At any rate, the Board's decision has granted the industry a grace period for coming to terms with the end of antitrust immunization of carrier and agent agreements. We believe, the commercial aviation industry, agents and airlines alike, is a naturally, highly competitive industry which is flexible and innovative enough to respond to all of the challenges of a marketplace that is driven by market forces and not government regulations.

The Department believes that the final order of the CAB should be permitted to remain in effect and that no legislation should be adopted. While the Board's order did not adopt all of the Department's pro-competitive recommendations (most importantly, immediate disapproval of certain anti-competitive accreditation requirements) it did establish a framework and phased-timetable to introduce effective competition in the passenger air transportation market. Forebearing from enactment of this legislation and allowing the Board's order to go into effect will preserve those aspects of the ATC/IATA conference system which maintain the benefits of common accreditation, and at the same time properly bring the marketing industry into alignment with the principles which govern the rest of American business practices.

That concludes my formal statement, Mr. Chairman, but I will be pleased to answer any questions which you or the other Subcommittee Members may have.

Senator KASSEBAUM. Thank you.

Senator Pressler has a couple of remarks he would like to make before he leaves.

Senator PRESSLER. I just want to say it is great to see you again, Frank. You are doing a great job over there.

Also, the travel agents do a great deal in my State with the confusion of airline deregulation. They are the only ones who are able to put together a travel package for a lot of people. It is just incomprehensible, and I think we should remember that as we consider this bill of Senator Warner's, of which I am a consponsor. I wanted to add that.

Senator KASSEBAUM. Thank you.

I think we will just sort of go on around. Mr. Knodt.

Mr. KNODT. Thank you, Madam Chairman.

Rather than use this short time to summarize our lengthy testimony, the substance of which is well known at this stage, I would like to make another point.

Much concern has been expressed in recent days about the level of consumer protection that has been provided to the public during the chaos created by the sudden shutdown and partial resumption of service by Continental Airlines. This sad situation is likely to be one of a series of major disruptions in this industry.

One of the main points of the CAB's decision in the Competitive Marketing case was to secure for airlines the ability to appoint agents who represent only one airline. If the decision stands and the industry does what the CAB wants, what position will the public that buys from such marketers be in when another shutdown occurs?

In the Continental case, many airlines were willing and able to honor tickets issued for Continental because they had been issued by industry agents on industry-recognized standard ticket stock. Under the CAB decision, this will not be true in the future.

The message for all of us is that we can't have it both ways. Under the approach of the administrative law judge, whose decision would be restored by S. 764, the industry can continue to work cooperatively to maintain and improve the level of consumer access and consumer protection.

Under the Board's approach, the industry and the consumer is condemned to fragmentation and a "let the buyer beware" atmosphere. These forces will undermine the consumer confidence that has been the hallmark of marketing in this industry for decades. That is why we are here in support of S. 764.

Thank you.

[The statement follows:]

STATEMENT OF RICHARD KNODT, PRESIDENT, AMERICAN SOCIETY OF TRAVEL AGENTS, INC.

Madam Chairman, the American Society of Travel Agents, Inc. (ASTA) is the world's largest trade association of professional travel agents, with approximately 10,000 domestic agent members and a total worldwide membership of agents and suppliers exceeding 18,000. We appreciate the chance to address you about issues that are of paramount importance to the ability of travel agents to continue marketing and selling air transportation and other services to the public in an efficient and professional manner. Public confidence in the United States integrated air transportation network, the best in the world and one that we believe the Congress intended to keep when it passed the Airline Deregulation Act, is in jeopardy. Only action by this Congress can assure the continuation of that system.

SUMMARY OF POSITION

The Civil Aeronautics Board's decision in the *Competitive Marketing* cases creates five major problems: (1) by allowing multiple classes of persons holding themselves out as "travel agents," the decision sets the stage for widespread public confusion about which agents represent which carriers and the validity and flexibility of the tickets they issue, (2) by permitting business travel departments, who are customers of airlines and not their agents, to force their way into the status of conference agents, the decision renders the conference system unworkable and defeats one of its primary purposes, (3) by removing antitrust immunity, the decision tolls the death-knoll for the conference agency programs—their standards cannot be maintained without protection from repeated antitrust attacks against conference participants, (4) by holding, without basis, that the Area Settlement Plan is an "essential facility" under antitrust principles, the Board has invited antitrust assaults against the uniform remitting procedures which, at any time, could be held to be per se antitrust violations due to "fixing of credit terms," and (5) the decision terminates the commitment of the conference airlines to share all distributors that have an agency relationship with the carriers. This will change the airlines perception of the trade-offs they are making by participating in the common accreditation process and their normal business instincts will lead them toward marketing alliances that will produce the collapse of the programs. There will still be travel agents and there will still be interlining, but it will all cost more, be less accessible for consumers and will lack the objectivity and neutrality that now uniquely benefits air travellers.

The CAB is taking an enormous risk with the country's transportation system. The question for the Congress is whether it wants such risks taken with the distribution mechanism that made airline deregulation possible. The most serious problems have not yet occurred, of course, largely because the CAB's decision is not fully effetive until 1985. But the problems are foreseeable—they exist not because of consumer dissatisfaction but because dedication to theoretical economics has overridden reasoned decision making. If the Board's theories are to be the foundation of national transportation policy, then we ask the Congress to so decide.

S. 764 would restore the Administrative Law Judge's decision as the final decision of the CAB. No one who could enter the ticket distribution market under the Board's decision would be foreclosed from entering by the Judge's approach. The key difference in this regard is that the Judge's decision would limit public confusion, would permit the industry to operate more efficiently and would prevent the adoption of "let the buyer beware" as the consumer's watch-word when dealing with travel agents. Consumers should not be left to lawsuits for remedies when the harm can be largely prevented in the first place.

S. 764 will not restore or create a monopoly. Under this bill accredited travel agents will not be the only people who can sell airline tickets. Innovations of all kinds, including new technologies, can be utilized whenever their time comes, without the need of government approval.

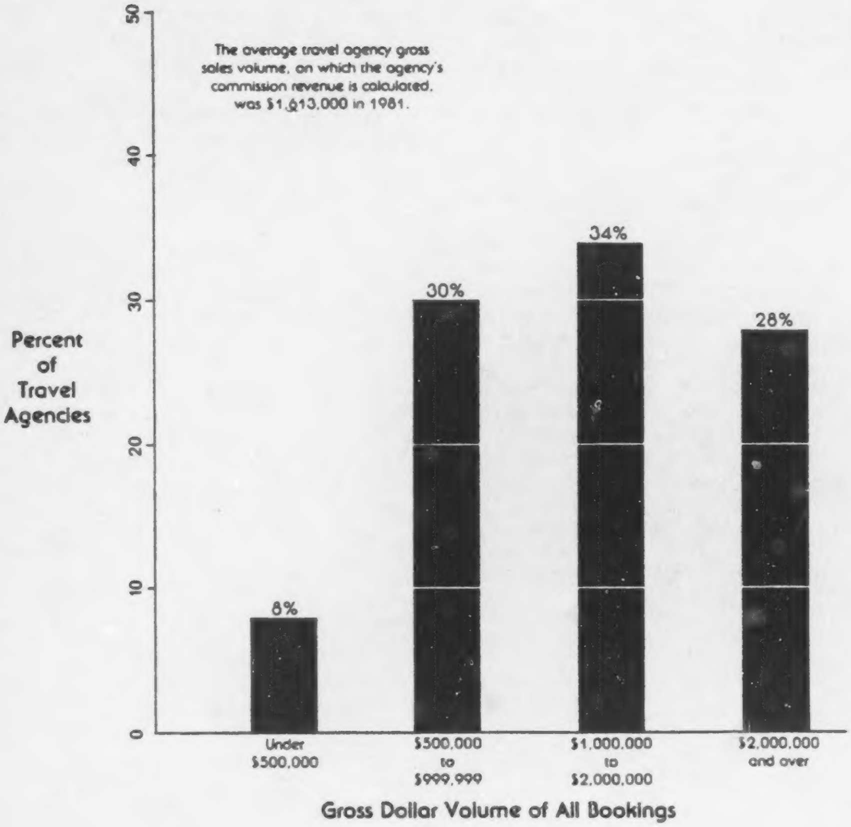
From the viewpoint of the travel agent, and the rest of the air travel and tourism industry as well, the risks entailed in the *CMI* decision are unwise and unnecessary, where a reasonable, balanced alternative exists that will open the market to new innovation while assuring that the existing agency network is retained. If the Board's assurances that there is nothing to worry about prove wrong, and realistic analysis of the legal and practical issues so indicates, a terrible disservice will have been done to the industry and the public. The more prudent course is embodied in S. 764, which ASTA supports.

I. AIRLINE DISTRIBUTION IS BIG BUSINESS SOLD BY SMALL BUSINESS

Like most travel agents, the overwhelming majority of ASTA's agent members are very small businesses. Average full time employment in our industry is about six persons per agency. The Small Business Administration classifies travel agencies as "small business" if they have gross commission revenue under $2 million. On that basis almost all agents are small businesses. The charts following graphically show the basic characteristics of our industry.

Although agents share the trait of small size, we are proud to note the diversity of opportunity that has existed in our industry under the professional accreditation standards that we discuss in this testimony. A very thorough survey conducted in October, 1982, showed that 46 percent of travel agencies are owned by women and that 11 percent are owned by minorities. Because of the accreditation system that results in automatic appointment of each qualified agent by all conference airlines, each new agency, regardless of its assets, starts business with equal access to all airline "inventory".

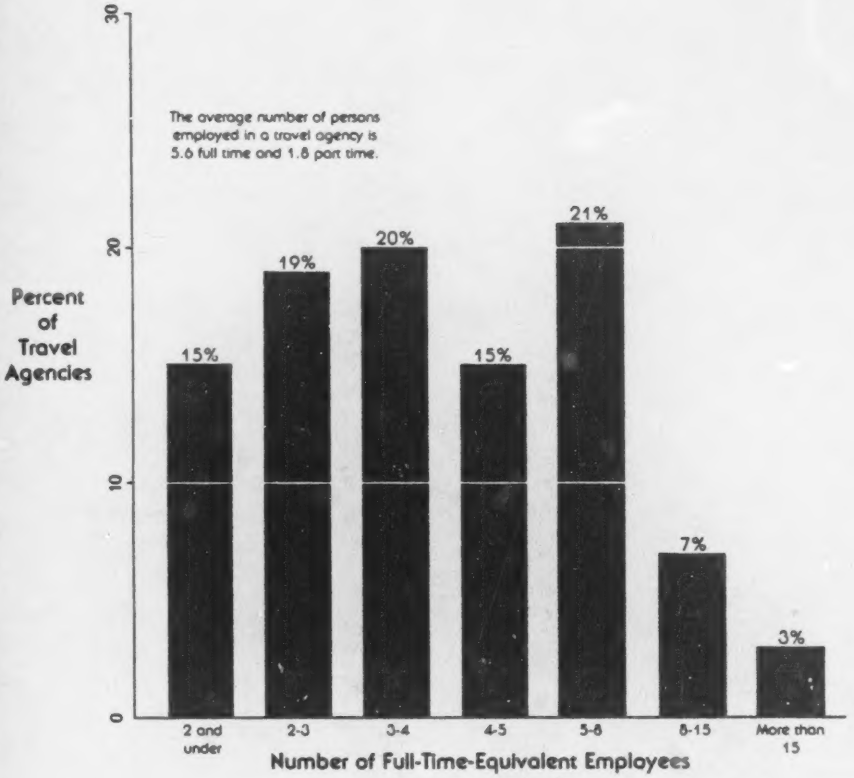
Travel Agency Sales Volume



The average travel agency gross sales volume, on which the agency's commission revenue is calculated, was $1,613,000 in 1981.

Source: The U.S. Travel Agency Market 1981, Louis Harris & Associates

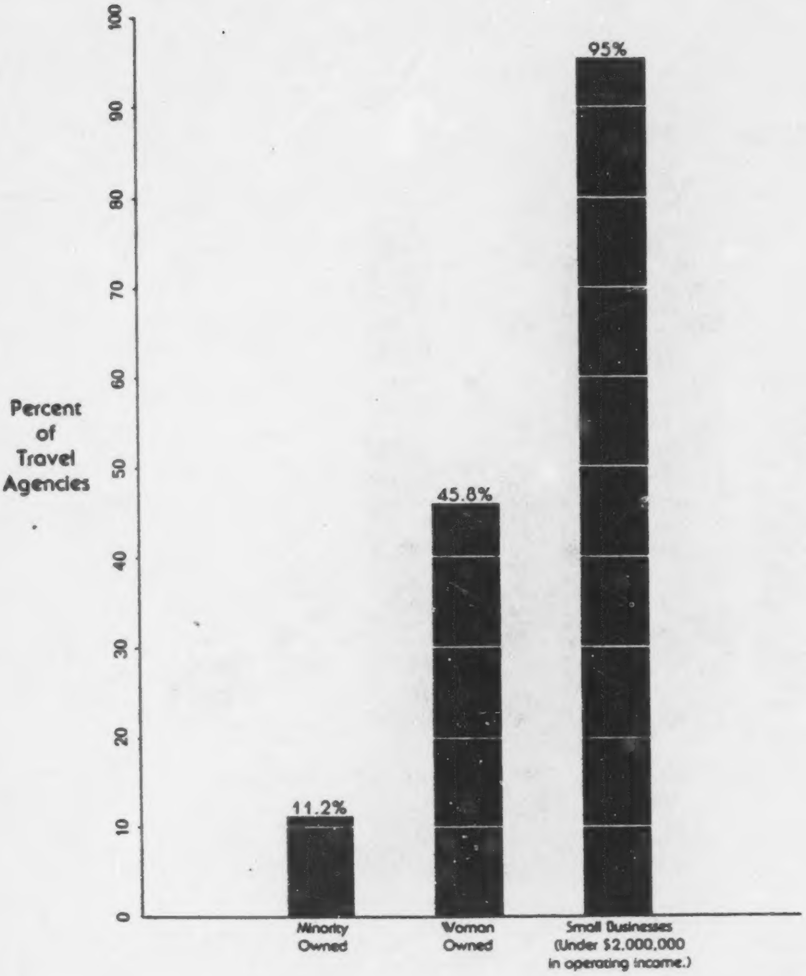
Number of Travel Agency Employees



The average number of persons employed in a travel agency is 5.6 full time and 1.8 part time.

Sources: The U.S. Travel Agency Market 1981, Louis Harris & Associates
Joint Travel Agent/Airline Economic and Value Study, Touche Ross & Co., 1978

Travel Agency Ownership



Source: ATC Survey, October 1982

Summary of travel agency accreditation standards

Financial—ATC: Bond ranging from $10,000 to $50,000 depending on sales volume and working capital.

IATA: Minimum working capital of $15,000.

Personnel—Owner or manager have at least two years experience as travel counselor or manager in passenger transportation business, must demonstrate knowledge of Travel Agents Handbook, and must be employed full-time on agency premises.

One full-time employee (can be the manager, above) must have at least one year experience in the last three years in airline ticketing with a conference carrier or accredited travel agency.

Location—A location must be set aside for the sale only of travel services, freely accessible to the general public, and open at least 35 hours per week. (IATA requires only that the office be open on a regular schedule).

Service to the public—Agency must do at least 80% of its business with the public (i.e., cannot do more than 20% with itself). No commissions paid for ticket sales to agency owners or employees.

Ticket security—Agents must comply with strict rules for protection of unused ticket stock. Supply of blank stock is limited.

II. UNCONTESTED PUBLIC BENEFITS OF THE INDUSTRY AGENT SYSTEM ARE THREATENED

We are before the Subcommittee today because of the recent decision of the Civil Aeronautics Board in the Investigation into the Competitive Marketing of Air Transportation. That proceeding was an investigation of intercarrier agreements designed to give the industry an efficient, shared distribution system of retail agents that is of enormous benefit to the industry and the travelling public. These agreements provide a centralized process for common accreditation and appointment of travel agents that is extraordinarily efficient. Because all travel agents must meet a specific set of minimal professional experience and financial integrity qualifications which are acceptable to the airlines, the airline parties to the agreements are enabled to accept each others' agents with a minimum of expense. The airlines are thus able to recognize and honor the tickets issued by such agents, facilitating the provision of interline transportation throughout the country and the world. A summary of the primary accreditation standards appears on the next page.

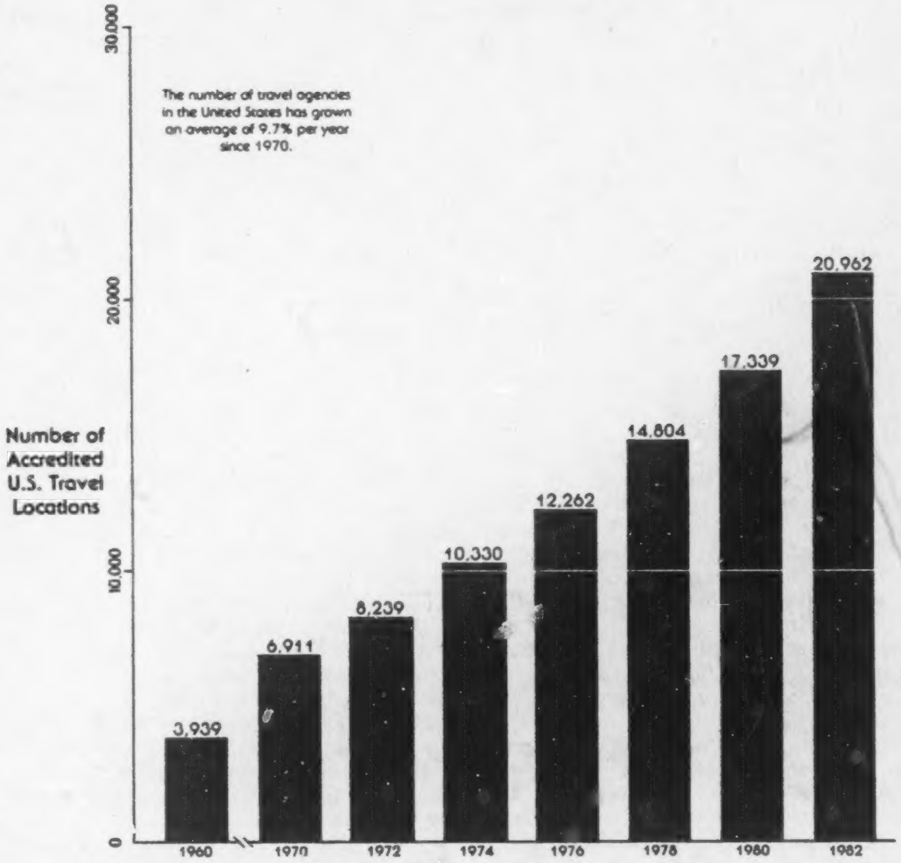
The integrated nationwide network of travel agents that is produced by the agreements has evolved, with the oversight and approval of the Civil Aeronautics Board, over a period of forty years. This system has served the airlines and the public exceptionally well. It lowers costs and helps sustain demand. It is extremely competitive and at the same time remarkably stable. The number of travel agent locations has grown steadily and rapidly to the point where there are now more than 22,000 accredited agency locations throughout the United States.

The agency industry has experienced substantial entry by new competitors and great diversity in the marketing approaches taken by individual agents. Agency failures occur at an extremely low rate. Even when an agent does fail, the tickets it has issued are honored by the conference airlines. Conversely, because the airlines can rely on a common system of agents, they have been able to guarantee substitute transportation for the public on agent-issued tickets when an airline ceases operations.

The system thus provides the public with greater security in dealing with the airlines through their agents and provides the airlines with a stable distribution network that now accounts for more than half of all airline sales. The extraordinary stability and rapid growth of our industry is depicted on the following pages.

In view of this record it cannot reasonably be argued that the conference rules have prevented new competitors from entering the airline distribution market. The old conference rules fostered a reliable, efficient and productive distribution system for the benefit of airlines and consumers alike.

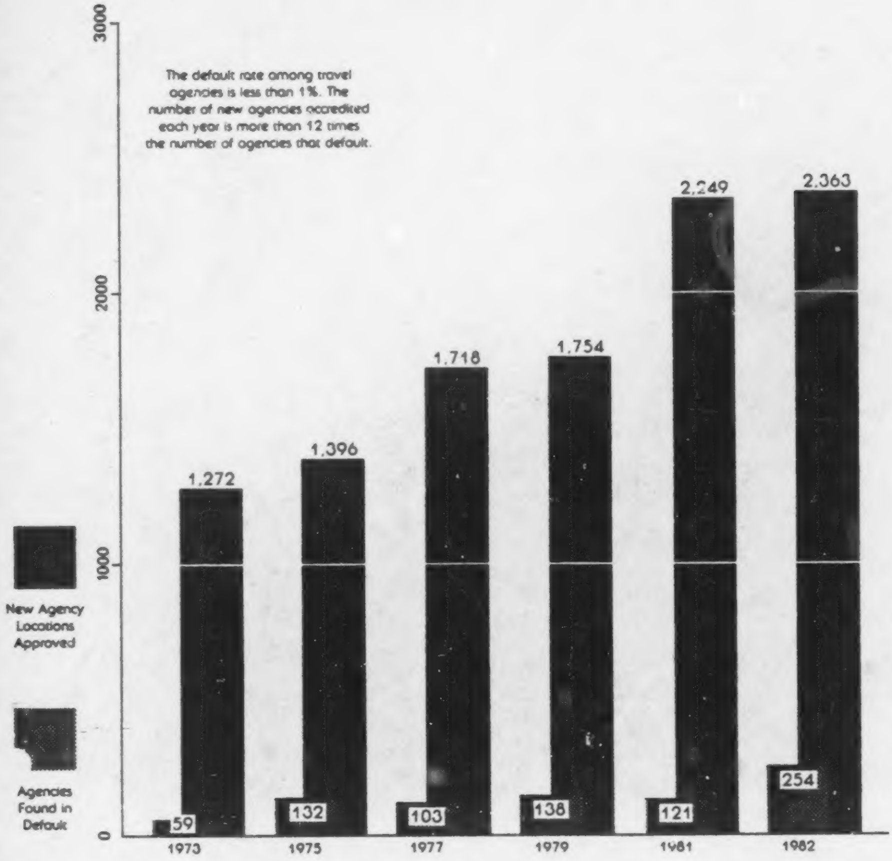
Growth in U.S. Travel Agencies



The number of travel agencies in the United States has grown an average of 9.7% per year since 1970.

Source: Air Traffic Conference Data

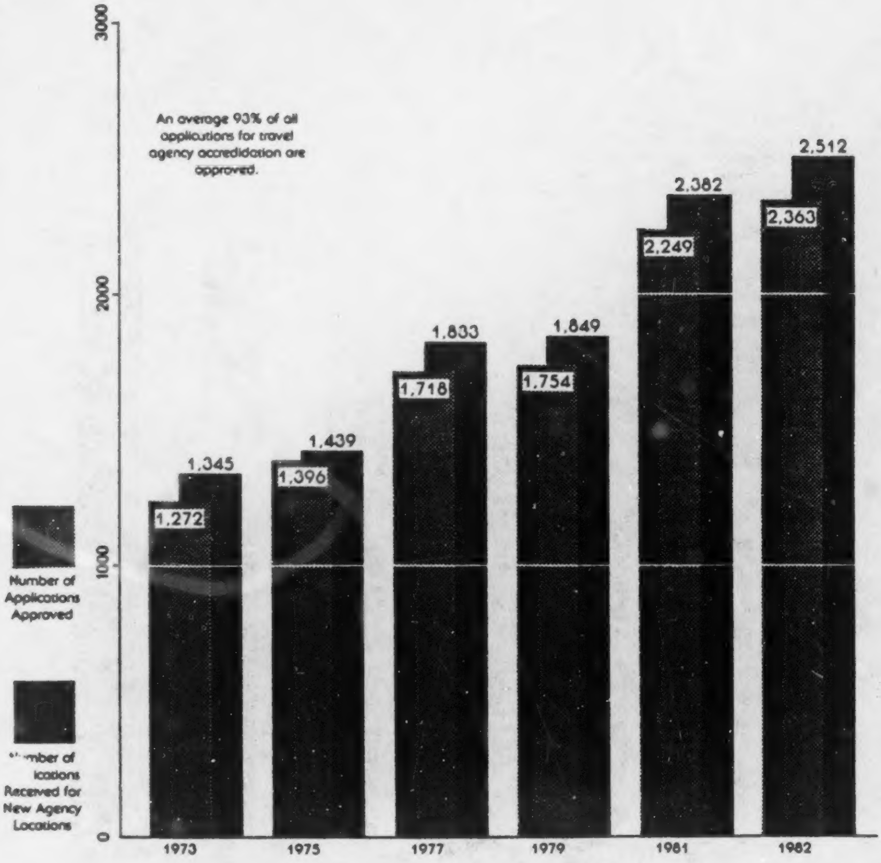
New Travel Agencies
vs.
Travel Agency Defaults



The default rate among travel agencies is less than 1%. The number of new agencies accredited each year is more than 12 times the number of agencies that default.

Source: Air Traffic Conference Data

Applications For New Travel Agency Locations



An average 93% of all applications for travel agency accredidation are approved.

Source: Air Traffic Conference Data

III. THE INDUSTRY AGENT SYSTEM PROMOTES COMPETITION AND MADE AIRLINE DEREGULATION A PRACTICAL POSSIBILITY

The agency system created by the agreements has promoted competition in many important ways and in particular has contributed to the ability of the airline industry to make the transition to a less regulated environment as contemplated by the Airline Deregulation Act of 1978.

In an increasingly confusing, and often chaotic, market, the fully representative industry travel agent, representing 150 airlines throughout the world, is a source of complete and objective information for consumers without parallel in other industries. The industry agent has likewise made it possible for existing airlines to enter new markets with maximum efficiency by providing such carriers with a pre-existing network of agents that already represent the new carrier. In addition, the network helps new airlines get started—they have immediate access to a national distribution system on equal terms with established carriers, thus avoiding an enormous financial burden in start-up costs. Travel agents also facilitate airline price competition by keeping track of, explaining and making available to the public, the wide variety of discount fares offered today. The conference system thus promotes airline competition and minimizes public inconvenience from the free entry, exit and pricing that were the goals of airline deregulation.

IV. THE JUDGE WHO HEARD THE EVIDENCE SUPPORTED CONTINUATION OF THE SYSTEM WHILE OPENING THE DOOR TO STILL MORE ENTRY AND INNOVATION

An Administrative Law Judge, who presided over the trial of the Investigation for the Board, recommended that the key features of the agreements be retained. This experienced Judge heard the testimony through 90 hearing days and personally studied all of the evidence and briefs objectively.[1] He recognized that the loss of the conference system for accrediting agents would severely impact the operation of the deregulated market for airline services.

The Judge held that the provisions requiring all agents to be accredited under the agreed-to standards were essential to maintain an efficient and integrated air transport network, especially one which would continue to provide interline transportation, a unique public benefit. The Judge also found that the accreditation system should apply only to persons acting as agents on behalf of the airlines, thus permitting entry into the retail ticketing business by firms interested in a non-agent or traditional retailer relationship with the airlines. He approved the Area Settlement Plan through which almost 100 million traffic documents are settled annually between agents and airlines. Finally, the Judge concluded that the agreements must continue to receive antitrust immunity, as they have for the past four decades, in order to continue operating effectively. This so-called "immunity" protects the airlines from civil and criminal attack against conduct that the government has administratively approved as "in the public interest."

The airline parties to the agreements, the travel agency industry, and the only firm that appeared to seek entry as a ticketing retailer accepted the Judge's approach as reasonable and balances. It sustained the vital elements of the agency network while allowing new opportunities for innovation.

V. A DIVIDED BOARD OVERRULED ITS JUDGE BASED ONLY ON ECONOMIC THEORIES

A. The decision

The Civil Aeronautics Board itself by a divided vote, overturned the recommendations of the Administrative Law Judge and struck down the key provisions designed to hold the system together. The Board concluded that the provisions requiring all agents to be accredited should terminate immediately with respect to sales on a single carrier on a given itinerary. The uniform accreditation requirement was also ended immediately in cases where two or more airlines agreed to allow interline sales by unaccredited agents across their lines.

The Board also disapproved, as of January 1, 1985, the standards designed to limit accreditation to persons interested primarily in engaging in a public business as an agent for promotion and sales of the airlines' services, as distinct from airline customers interested primarily in dealing for their own account and using agency accreditation as a device to obtain discounts from prices that airlines would otherwise charge. Without reference to the public confusion that would result if non-conference agents obtain access to standard agents' ticket stock, the Board ordered that the Area Settlement Plan must be opened to any ticket seller desiring to participate. Finally, the Board stripped all of the carrier marketing agreements of all antitrust immunity as of January 1, 1985, and indicated that many parts of the agreements would have to be changed in order to avoid antitrust attacks in the future.

---

[1] The summary of conclusions from the judge's [illegible] decision is attached to this testimony as exhibit A and is in the committee files.

Thus, while both the Board and the Judge sought new avenues for entry and innovation, the Board eliminated the vital elements of the programs that the Judge has sustained to assure the survival of the public benefits of the accreditation programs. And, after three and one-half years of review, the Board exposed the agreements to an open-ended, indeterminate compulsory legal process as the real means of deciding what the agency programs may properly contain.

B. The rationale

The Board did not decide the CMI on the basis of substantial evidence that the agency system has failed to meet some significant market demand, or that consumers were dissatisfied, or that the programs are frozen and incapable of change to meet new market conditions. No such findings could have been made on the record developed before the Board. The entire basis for the Board's objection to the Judge's recommendations is economic theory.

The Board saw the central issue as one of deregulation versus regulation. It had earlier concluded that the conferral of antitrust immunity was inconsistent with deregulation, even though the Airline Deregulation Act continues indefinitely the authority of the Board to grant such immunity. The Board's desire to strip the immunity from the agreements led it to eliminate provisions that it believed, for the same theoretical reasons, were not sustainable without it, regardless of the public transportation benefits that those provisions secured.

The Board also interpreted the agreements-review section of the Federal Aviation Act (Section 412) in a way that placed an impossible burden on proponents of the agreements. This is clearly revealed in the following passage from the Board's opinion:

"The dominance of travel agents in ticketing airline services is not in itself objectionable. If this market position were achieved or persists solely because of the efficiencies of the existing distribution system vis-a-vis other options for purchasing tickets, there would be little basis for challenge under antitrust standards. However, with the exclusivity provisions in place we cannot find that this is the result of the normal operation of market forces but must instead presume that present industrywide agreements are dictating marketing structure."

Under this rationale, as long as the mandatory accreditation rules were a reality, as they have been for decades, any accreditation agreement would have been condemned. Since the market observed by the Board in the *CMI* did not conform to the market that the theoreticians thought would have existed in the absence of the agreements, the Board, although it could point to no market demand that had gone unmet and to no evidence of competitive failure or monopolistic pricing, rejected the agreements before it.

This is neither the approach nor the result that the Congress intended when the agreement-review and antitrust immunity sections of the Act were amended in 1978 and 1979. The Board's recognized enthusiasm for completing the deregulation process must be measured and overseen by the Congress when matters affecting the basic structure of the industry are involved. This is especially important where the Board itself is facing near-term extinction and will thus not be available to deal with long-term consequences of its decision. Conversely, the deadlines established by the Board's decision effectively foreclose any successor agency from reviewing the Board's action in a timely manner.

C. There was no problem that required this solution

The Board says that there is nothing to worry about—the marketplace will take care of everything; nothing serious has happened since the Board's decision, the most efficient business will prevail, consumers will get what they demand and so on.

These economic cliches, as seductive as they sound on the surface, miss the point entirely. Travel agents face more competition from new entrants to our business than any service industry in the country. We are not strangers to competition, as the historical record clearly shows, and we have not based our objections to the CAB's decision on the claim that the business of professional travel agents should somehow be protected.

It was in fact market forces that led the airlines to create the agency accreditation programs in the first place and to build their marketing systems around them. If there has been any restraint on the development of marketing alternatives, it has been the CAB's own regulation of non-agency ticket distribution (such as charters, contract bulk fares and similar innovations), and not the accreditation programs, that has been the cause. We did not oppose the introduction of contract bulk fares into the industry—we did point out the risk of consumer confusion and the CAB decided to regulate disclosures to assure that the public understood what was being offered to them.

The market forces that led the carriers to rely upon accredited agents as their primary distribution channel still exist. They are evident in the demand of the airlines for mutually agree-upon professional standards that enable them to share the entire agency network and that promote public confidence in that system. They are also present in the increased reliance placed upon the professional travel agent by the travelling public during the confusion over fares and services that has marked the road to airline deregulation. the accredited agency distribution system thus meets the needs of the airlines that pay for it and the consumers who rely upon it.

But the fact that demand for the services of industry agents continues to exist does not mean, as the CAB has argued, that the airlines will spontaneously adhere to the conferences as long as doing so serves their interest. The problem with the Board's decision is that it removes the legal regime necessary to assure that the supply of industry agents, a unique creation of joint action by competitors, can continue to be offered. These difficulties have not yet materialized, of course, because, among other things, major elements of the decision have not taken effect.

The CAB argues that the so-called agency exclusivity provision is nothing more than a transparent scheme to protect accredited agents from competition while serving no meaningful role in generating the public benefits of the accreditation program.

Can it be that simple? Who or what are agents protected from? The number of agency locations doubled over the past eight years. In 1982, while the programs were still in full effect, five new agency locations were opened every day on the average. It is very difficult, to say the least, to imagine a situation producing more competitive pressure on agents. And we emphasize that the Judge's decision that we support would allow new forms of ticket distribution to enter the market, including, but not limited to, the single largest retailer of tickets of any kind in the United States.

Perhaps, then, the problem is the alleged predictability of the form that agency competition takes, as the CAB suggests. Again, an open-minded look at the actual marketplace shows extraordinary diversity in the marketing of agency services. We have agencies that tend to specialize in different types of markets: vacation travel, commercial travel, packaged services; or who emphasize different geographic destination markets as areas of special expertise; or who tend to serve specific segments of the market, such as individually planned touring itineraries, ethnic groups, commercial customer in-plant services, and so on. Today's agents offer a vast and varying array of individual services such as ticket delivery, travel cost effectiveness reporting, dedicated staff, WATS lines, 24-hour service, guarantees of lowest fares, onsite service, to name a few. And agents who have emphasized one type of market or service in the past are branching out into new areas, always challenging the other agents with whom they compete. No, predictability cannot be the real problem because it simply doesn't exist.

The Board appears to be saying that the real problem is that the airlines have given up their freedom of choice. The Board believes that the competitiveness of the air transport system depends upon each airline being free to appoint its own exclusive agents or to agree with one or a few other airlines to share semi-exclusive agents.

As theoretical matter this seems not unreasonable. But this rationale first overlooks the fact that the agency agreements have been entered into and maintained voluntarily by the airline participants. And those carriers are today defending that free choice they made, as a deliberate and valuable tradeoff necessary for the preservation of the cooperative airline services that benefit the public and all carriers in return. Thus, the Board's decision seems largely based on a well-meaning but misguided effort to "save the airlines from themselves."

And on a closer look, what is the real benefits? It would certainly permit, as the Board has advocated, any airline to appoint anyone it likes to act as its agent when its own financial condition has begun to impair its market position. But this prospect raises several serious questions.

Will such unaccredited agents have the same incentive as accredited conference agents to fully inform their clients of the risks affecting the public's money and expectations in such cases? If nonaccredited agents will make the same disclosures as industry agents accredited by the conferences, then the rationale for allowing them to operate (airline-self-defense) makes no sense. If non-conference agents are not going to inform the public of these risks, is the public welfare improved by allowing such persons to hold themselves out as travel agents? If such "agents" gain access to standard agents' ticket stock, how will the public distinguish between the interlinable traffic documents issued by industry agents and the restricted tickets issued by the new group?

As a society we do not ordinarily allow companies in financial difficulty to operate free of the normal restraints on deception and unfair practices, just as we do not allow them to unilaterally disregard their obligations to protect the safety of the public. Thus, even if it were true that everyone in the industry has an incentive to act responsibly, fairly and rationally, a naive concept disproved by all of our industrial history, the accreditation programs as approved by the Judge assure the industry and the public that, as to agents, there will be no departure from professional standards in the accreditation process. But it is also true that under the Judge's approach, any failing or distressed carrier can hire anyone to dispense its tickets to the public, save only that they not purport to be a "travel agent."

Travel agents and airlines alike are opposed to opening the door to unprofessional conduct in our industry. We have no incentive or desire to drive any airline from business—quite the contrary, agents are better off, our jobs are easier and our profit opportunities better, when the airlines we serve are profitable, stable and vigorous. At the height of the financial battering that the airlines experienced during the 1981-1982 recession, ASTA vigorously supported the creation by the airlines of the Default Protection Plan. Under the DPP the purchaser of a ticket issued by an accredited agent is assured by conference airlines that substitute transportation will be provided if the ticketed carrier ceases operations. The DPP protects the public and the industry and, significantly, was the recipient of antitrust immunity from the CAB. Agents also supported changes in ATC procedures that would assure that an agent's choice of airline identification plate for ticketing purposes was as competitively neutral as possible, thus avoiding manipulation of airline cash flows for the benefit of a handful of airlines at the expense of the rest.

We have built a system that gives all airlines, new and established, equal access to a national distribution system that assures each carrier of its fair opportunity to gain passengers based on the competitive value of its services and fares. The airlines and the public have a high level of confidence in that system and nothing should be allowed to undermine that confidence by benefiting a few at the expense of many. The success of agency distribution depends on more than the existence of a complex marketplace. Yet economic reality suggests that the CAB's goal of having non-conference agents in the market will be achieved only by eliminating the professional standards that have protected the public under the accreditation programs.

ASTA fundamentally opposes a return to "let the buyer beware" as the standard for service in airline distribution. There are, of course, other ways of trying to deal with that situation. That is why agents strive to develop and maintain professionalism through education-and-training programs. But it is generally true that you can't make a silk purse from a sow's ear. It is necessary to start with a minimum base for entry—and that is most efficiently provided through the centralized administration of the conference agency programs. The loss of that minimum base of standards, the inevitable result if non-accredited agency relationships are developed, will raise the cost of other efforts to maintain professionalism while diminishing the positive results of those effects.

Madam Chairman, we are well aware that the CAB has labelled our view "apocalyptic." This is not so. Nothing we have described is going to "destroy travel agents." We're here to stay and most of us can adapt to the market that, as the CAB often notes, we know best. That is not the problem. What is likely to happen is more mundane than that, but no less serious.

VI. THE ECONOMIC HARM ARISING FROM THE CAB DECISION IS DIRECT AND IMMINENT

A. The impact of allowing BTD's to force their way into the agency programs

The CAB's decision to strip the airline accreditation agreements of their antitrust immunity will, in our view, have severe consequences for the industry and the public. The Board itself has noted that business travel departments, in-house divisions of large corporations that write tickets and make reservations for their parent firm (basically in-house purchasing departments), have been trying to force their way into the status of accredited agents under the programs. They seek this not because they want to be agents of the airlines in any meaningful sense but because they are customers who seek discounts that airlines have thus far been unwilling to grant voluntarily.

Without antitrust immunity, the ability of the airline conferences to limit the agency program to real agents, i.e., persons who stand in the shoes of the carrier and deal on its behalf with the public, is in grave doubt. If the BTD's, as they are called, are successful in forcing their admission to the programs under threat of antitrust lawsuits, which they have repeatedly made, the airlines, in order to retain the programs, would have to deal within the conferences with their agents and with their customers, the BTD's, at the same time, and the airlines will have to do so subject to the constant threat of antitrust attack. We see no practical way that the conference process can be continued under these circumstances.

Alternatively, the conferences could refuse to allow any input by affected parties, thus cutting off the right of agent participation that the CAB required of the conferences years ago to assure fair play for agents affected by the collective action of the airlines. Of course, the agents would have the right to challenge conference actions under the antitrust laws too.

The problems with this approach are painfully clear to those of us who have participated in the development of these programs. The entire accreditation system, and the many benefits that flow from it, depend upon an atmosphere of cooperation. We despair at the notion that the conferences can continue to function under a reign of antitrust terror. Moreover, the travel agency community would not willingly accept a regime in which its right to participate in conference processes is curtailed and the remedy for grievances is an antitrust suit.

B. Other sources of antitrust attacks

The conference participants, including travel agent representatives exercising rights to make input to conference decision-making, would also be exposed to antitrust attack from other sources. Although the Board appears to be saying that the airlines are free to recreate the equivalent of conference agency exclusivity through bilateral rather than multilateral agreements, the reality is likely to be quite different. Even if the airlines were able otherwise to continue using only accredited agents for interline purposes and if exclusive distributor-agents are not employed, any person who can not or will not comply with conference standards would be able to sue the conferences, and perhaps anyone who participated in conference discussions, alleging a "group boycott" in violation of the Sherman Act. A single successful attack of this kind could lead to a wave of similar claims. Every conference meeting would be fraught with antitrust exposure, making continual cooperation on matters of common interest exceedingly costly or impossible.

The Board says that such antitrust claims will be frivolous and are therefore of no concern. But again the reality is that no court will be bound to follow the Board's view of what is frivolous and what is not. Individual courts and juries, making the "rule of reason" balancing analysis traditionally applied to such claims, could quite possibly find one or more of the jointly-set accreditation standards a restraint of trade, in spite of any statements to the contrary in the CAB's decision. And as time passes, the weight likely to be given to the Board's opinions will diminish in any case. Since most antitrust precedent has been developed in industries quite different from air transportation, the guidelines for acceptable conduct in many areas will remain unclear through years of costly litigation.

Moreover, the Department of Justice has already indicated its dissatisfaction with many provisions of the conference programs that the Board did not disapprove. DOJ has also filed with the CAB its strong opposition to new ATC resolutions designed to help the public and the airlines understand who they are dealing with under the regime created by the *CMI* and to permit the conference to continue enforcing its rules as to accredited operations. DOJ now appears to be saying that after 1984 no agreements of any kind, not even bilateral interline agreements, can properly contain understandings as to what kinds of agents are acceptable to each interline partner.

Taken together with DOJ's continued opposition to agreement provisions that the CAB in fact approved, it seems that DOJ is reverting, in practical effect, to its original position before Judge Yoder—that the agency programs, even without exclusivity, are anticompetitive and should be discontinued. ASTA had alerted the CAB that DOJ's asserted "change of position" following the Judge's decision was more tactical than substantive. Now that DOJ has made clear its opposition to conference efforts to enforce its accreditation standards, there is little room for doubt that DOJ wants to destroy the agency programs—not by overtly seeking CAB disapproval, but rather by creating uncertainty through threat of litigation and thus preventing the conferences from operating in a meaningful way.

C. The Congress has intervened in analogous circumstances

Such uncertainty comes with a high cost. The history of United States export trade is illustrative. In 1918 the Congress enacted the Webb-Pomerene Act to provide partial antitrust immunity for export trade in goods so long as the activity did not restrain trade or depress prices in the United States. The purpose was to encourage firms otherwise forbidden from acting in concert to pool their resources and assist one another in selling abroad.

In the 1930's Webb-Pomerene associations accounted for almost 20 per cent of American exports. However, by 1979 only 33 of the 150 such associations that were created since 1918 had survived, and accounted for just 2 per cent of total U.S. exports. The Congressional committees investigating the U.S. export problem in 1981 found that one of the most significant reasons for the decline was the "chilling effect" of the federal antitrust laws as applied to cooperative exporting efforts. As the Senate Committee on Banking, Housing and Urban Affairs reported:

"The vagueness of the Webb-Pomerene Act leaves uncertain what activities will constitute a substantial restraint of domestic trade. As a result, the threat of antitrust litigation has served as a deterrent to broader utilization of the Webb-Pomerene Act.

"This theme arose frequently in the 1981 hearings, as several business witnesses and attorneys commented on the difficulty of obtaining definitive antitrust guidance from the Justice Department and on the uncertainty Justice's ambiguity created for businessmen, small businessmen particularly, who cannot afford the time and cost of defending themselves in a suit, even if they might ultimately prove successful." (S. Rep. No. 97-27 at pp. 18-9]

Even though the Webb-Pomerene Act provided an exemption from the Sherman Antitrust Act for certain export trade activities, the scope of the exemption was limited and unclear. Consequently, cooperative exporting efforts were continually subject to actual and potential antitrust challenges, from both the federal government and private plaintiffs. The legal uncertainty created by the Webb-Pomerene Act was described by the House Judiciary Committee as follows:

"The hearing record suggests a second, related problem—possible ambiguity in the precise legal standard to be employed in determining whether American antitrust law is to be applied to a particular transaction. There remains * * * some disparity among judicial interpretations and between those interpretations and executive enforcement policy regarding the quantum and nature of the effects required to create jurisdiction.

* * * * * * *

"For example, the Business Roundtable believes that "[j]udicial decisions are rife with inconsistencies regarding the types of effects on the domestic economy that must be demonstrated in order to establish U.S. antitrust jurisdiction over an international transaction." * * * The Roundtable goes on to note that "[t]he commentators are also divided on the correct test to apply."

* * * * * * *

"The committee need not chose between these competing views to conclude that legislative clarification is appropriate. * * * [E]ven if different formulations have not led to divergent results, the possibility of divergence in results certainly exists * * *. Businessmen and antitrust counsel cannot safely ignore the current differences in formulation. H.R. 5235 will provide assurances against private plantiff's successfully proposing different standards than those employed by the Department of Justice." [H. Rep. No. 97-686 at p.6]

It was in response to such uncertainties in the antitrust laws, and their dampening effect on cooperative export trading activities by U.S. firms, that Congress passed the Export Trading Company Act of 1982 (P.L. 97-290). The ETC Act both broadened the antitrust immunity previously granted by the Webb-Pomerene Act (for example by including joint exporting of "services", not just goods, within the Act) and adopted an administrative procedure for assuring firms in advance of the scope of their immunity. Exporters contemplating joint trading may now apply to the Department of Commerce for a certificate of antitrust immunity to protect the proposed exporting activities. The grant of such a certificate narrowly limits the antitrust exposure of the approved activities, for example by barring any criminal prosecution and restricting private antitrust actions to actual instead of the usual treble damages. The ETC Act also restricted the applicability of the Sherman Act and Federal Trade Commisssion Act to export trade. The purpose of these changes was succinctly stated by the House Judiciary Committee:

"The purpose of [the Act] is to increase the export trade of the United States by encouraging joint activity that will lead to economies of scale in export operations. [The Act] is a response to sentiment in the business community that certain federal banking and antitrust laws hamper the complete development of American export trade, especially among small and medium-sized businesses.

* * * * * * *

"Title II, the focus of this Committee's action, is intended to minimize any antitrust uncertainty in joint export activities. . . . A successful applicant receives a certificate that will greatly reduce any exposure under the domestic antitrust laws. These features are particularly intended to encourage joint export activity among small and medium-sized firms, produce efficiencies and increase American exports." [H. Rept. No. 97-636 at p. 1, emphasis added]

That, Madam Chairman, is exactly what the airlines and travel agents are trying to do through the conference program.

D. Costs and benefits of terminating the conference accreditation system

Can our industry survive without similar legislative relief? Of course it can, but only at great cost. Those costs will inevitably be passed on to consumers. Will consumers get something valuable in return? The answer is clearly "no." In any case, there is a big difference between survival and continuing to deliver to the public the integrated air transportation service that it wants and deserves. Small travel agents simply cannot afford to be involved in costly antitrust lawsuits as the price of continuing the conference process, regardless of the benefits that arise from central accreditation.

There are other problems as well. Another feature of both the domestic and international conference is Office of the Travel Agent Commissioner. This office was created to assure fairness to new agent applicants and to those against whom the conferences had brought an enforcement complaint alleging some infringement of the agent's obligations to the airlines. The Commissioner's procedures assure due process to all agents. The Board removed immunity from these programs as well. There is little likelihood that the Commissioner program can continue to function when an attempt is made to enforce collectively-reached standards and rules which lack immunity.

It is easy to say, as the CAB often has, that other industries get along with only the Sherman Act and therefore so can the airlines. The problem is the gap between theory and reality that underlies such generalizations. Many of the "other" industries the CAB presumably has in mind are subject to a vast array of federal and state laws governing their operations, including the Uniform Commercial Code, state and local licensing laws, federal and state safety regulation and many others. The airline industry, on the other hand, is not suitable for that kind of fragmented, product-oriented regime. The distinctive feature of the airline industry is that it not only involves a service in interstate commerce but is heavily dependent on cooperation among competitors to produce joint services that are of unique and enormous benefit to the public. We know of no other industry that depends as heavily as ours upon cooperation to produce such a large share of the total service offered—interline service involving two or more airlines accounts for a third of travel agents' air sales. Other cooperative services are well known to airline travelers, such as the ability of most any airline to accept or refund tickets written on any other airline. It is in this uniquely cooperative atmosphere that the conference agency programs were born, have developed and should continue.

Will the public really benefit from a regime in which a necessarily cooperative system like the agency accreditation programs must be maintained through litigation or the threat of litigation? Will public welfare improve if the successful and publicly accepted industry system of self-control is supplanted by myriad state and local efforts to protect consumers? Both common sense and business sense suggest that the prospects for the programs under this approach are extremely poor.

When the accreditation programs fail, the consequences are clear. Industry costs for distribution will rise, as the expense of reviewing, approving, supervising and enforcing an agency network shifts from the conferences to the airlines. Each airline's effective access to the national distribution system will diminish as the cost of access increases. Carriers entering markets they have never served will find that establishing a marketing presence is much more costly. On the other side of the board, entry by new agents will diminish as the cost of application and compliance with individual carrier rules increases. As some carriers see a short term advantage in trying to establish more-or-less exclusive agency distributors, the diversion of marketing resources by competitors to responsive practices will escalate and commitment to the fully shared agency system will decline. The willingness of the airlines to continue participating in publicly benefical programs such as the Default Protection Plan would likewise diminish. The overall effect on competition in the industry will be negative, as the Judge concluded:

"The difficulty in applying the rule of reason test to determine the legality of the agreements under the antitrust laws, the inability of the Board to give res judicata effect to any determination by it in that regard, and the express position of the Justice Department that the agreements in their entirety are anticompetitive underscore the need for antitrust immunity in order to secure the important public benefits dependent upon the agreements and the marketing system they enable and represent." [2]

None of these projections is "apocalyptic"—they are the natural and foreseeable consequences of the Board's decision, at least if the Board's rationale has any substance. The Board itself explicitly recognized that use of agents outside the conference programs would be more costly and less convenient. But that does not mean that it will not happen; nor does it mean that it would be "competitive madness" for any carrier to undertake non-accredited agency relationships and start the deterioration process. There is ample precedent in the short-term pricing strategies that have pervaded the airline industry through most of the deregulation process. The entire premise of the Board's decision is that some airline may want to do this and should not be deterred.

Who then will pay the increased costs that result from deterioration or elimination of the accreditation programs? The travelling public will have to pay, of course.

Are there reasonably foreseeable benefits to the public that would not exist under the Judge's approach and that warrant risking the collapse of the conference approach? The Board has not identified those benefits except to say that "competition is best". Although the Board claims that there might be some portion of the market that could be served "more efficiently" by a non-conference agent, it does not identify that "portion", or indicate what aspects of the conference system, as approved by the Judge, would prevent the efficient servicing of that demand. The Board never explained why its enthusiasm for exclusive distributorships could not be accommodated under the Judge's approach, which could avoid confronting the public with "travel agents" who are really only distributors for one or for a few select carriers.

It may be asserted that the Board's approach is necessary to help keep commissions under control by creating a threat of entry by firms willing to sell for lower commissions than agents may demand. But the evidence in the CMI established that at current commission levels, the airlines were getting a genuine bargain in the level and quality of efficient service rendered by the agency system.

It is a fact, of course, that domestic airfare commission rates on the average are higher today than they were in 1978. This resulted from the CAB's decision in 1980 to allow commission rates to be determined competitively. For the prior forty years rates had been set by airline agreement and, as one would expect, those agreements set the rates below the competitive level. When that agreement was eliminated, the rates increased, as was expected. Domestic rates followed the course of international commissions, which were opened several years earlier, by increasing and then levelling off. The current average rate on all agent sales is just under ten percent. The present air commission rate is generally less than rates offered by non-air travel suppliers (such as hotels and car rental firms) who are, incidentally, not subject to any form of exclusivity in their choice of agents to represent them. Airline commission rates thus compare favorably with compensation provided by similar service suppliers and are not artificially inflated by the conference accreditation agreements.

It is also a fact that the airlines' total commission payments to agents have increased since 1978. This is accounted for in part by the rate increases just discussed. But there is another major factor at work, and that is that the travel agents' share of total air transportation sales has also increased, from about forty-six percent of domestic sales in 1978 ($11.4 billion) to somewhat more than 60 percent in 1982 ($21.8 billion). This increase in sales is itself the result, in large part, of the confusion that deregulation has produced for the public. Services are changed frequently, as carriers enter and exit new cities. Yet general public awareness of the details of these changes is very limited. And fares change virtually every day, with airlines offering new fare classifications, eligibility rules, discounts and gimmicks by the thousands.

---

[2] Opponents' assertion that other industries may not seek relief from antitrust law lacks point, since Congress has determined to continue the possibility of antitrust immunity in the airline industry where required by the public interest [Initial Decision at 210.]

If one looked no further, it might appear from the numbers presented above that deregulation has been a windfall for travel agents. But let us look beneath the surface of the statistics. The fact is that more than 6,000 new agency locations opened since passage of the Airline Deregulation Act. In fact during 1982 an average of five new locations opened every day. Thus, travel agents have themselves experienced a substantial increase in competition for the public's patronage since the advent of deregulation. And the entry continues—as of last month, the number of travel agency locations doing business in the United States exceeded 22,000.

Moreover, in early 1979 only about 2,000 of the 14,000 agency locations then in existence had installed automated reservations systems. Since then more than 15,000 additional locations have invested in automation at tremendous cost, and the numbers continue to increase. This investment was essential to cope with the staggering changes in fares and services that airline deregulation has produced. While automation is intended to increase productivity, it has, in recent years at least, served as much as an offset to declining productivity caused by the need to spend more time advising clients and by the need to reissue tickets repeatedly to accommodate rapid price changes. An industry investment of this magnitude, involving a 750 percent increase in the number of automated locations in just three years, would not have been possible if commission rates had remained fixed at the pre-1980 levels.

Thus, while individual agents may have experienced improvement in market share and commission rates, they have had to make substantial investments in automation to keep pace with changing market conditions. The agency network has allowed the airlines to shift to travel agents the time and expense of dealing directly with the public in complex transactions and thus avoid huge investments in overhead. The ebb and flow of demand and the task of servicing clients affected by changing prices and services is absorbed to a large extent by the agent. Under deregulation, it is not unusual to reissue a ticket two or three times to reflect changes in fares or itinerary. Under existing commission practices the agent receives only one commission, no matter how much time is spent reissuing or revalidating documents. When prices spiral downward from discount fares, the commission drops proportionally. No other industry can obtain this quantity and quality of service at a ten percent markup.

Judge Yoder's approach to the agency programs will provide ample competitive pressure on agent commissions in the future. The new entrants allowed by his decision are the kinds of firms that would have a chance to compete at lower rates than agents require. Unless it can be established that the present agency network is inefficient or is likely to become so in the future, and that has never been shown, it is unrealistic to expect that agents will be able to enter the market outside the conference programs at commissions lower than conference agents receive. Indeed, the Board itself found that non-conference would be more costly and less convenient than conference agents. The Judge's decision therefore contributes as much to the "commission control" objective as the Board's decision, but without the risks to the conference agency system.

VII. S. 764 WILL ACCOMMODATE EVERY INTEREST WORTHY OF CONCERN

ASTA's solution to these problems is straightforward, the prompt passage of S. 764, the Air Travelers Security Act of 1983. This bill is designed to accomplish only one thing, but it is vital to the future well-being of the air travelling public and to the industries which serve that public. The bill directs the Civil Aeronautics board to vacate its decision in the *Investigation Into the Competitive Marketing of Air Transportation* and to replace that decision with the Recommended Order of the Adminstrative Law Judge who tried the case through 90 days of hearings. S. 764 has the support of the professional travel agency community, comprising almost 17,000 agencies with 22,000 locations in every corner of the nation. Its passage is also endorsed by the domestic and international airline industries, more than 150 carriers linking the United States internally and with the rest of the world. The concern about the CAB's decision is so widespread that leaders throughout the hotel and cruise industries have likewise called for enactment of S. 764.

S. 764 is a short and simple bill on its face. But the issues raised by the *Competitive Marketing* case are enormously complex and far-reaching. During the three-and-one half years that the case was pending before the CAB, a record of more than 40,000 pages of exhibits, testimony and decisions was produced. The case involved two Administrative Law Judges and spanned the terms of two Chairmen at the CAB. The cost to the industry of litigating the case must be tolled in the millions of dollars. Yet in many key respects the Board has not really made a decision at all—

it has left the airlines and agents to face further litigation about the very same standards and procedures that were before the Board in the *CMI*.

The *Competitive Marketing* decision is a case of economic theory run amuck, a case of dedication to principle being carried beyond the limits of commercial common sense and business reality. More importantly, the *CMI* is a case in which the Congress' intent in the Airline Deregulation Act of 1978 has been misapplied to the inevitable detriment of the travelling public and the airline and travel agency industries. Surely in the face of the Board's near-term demise, the Congress must examine in the closest detail one of the most important decisions that the CAB has ever made.

Will enactment of S. 764 prevent business travel departments from being accredited as industry agents? Yes. One of its objectives is to allow the conferences to retain the rules that limit accreditation to firms whose purpose is to act as selling agents to the public. Will these business travel departments be adversely affected? No. It is critical to understanding the agency programs to recognize that they are designed to deal only with conduct within the scope of the conference. BTD's thus will continue to be able to bargain for discounts individually with any carrier willing to do so.

In addition, nothing in the conference rules prevents any willing airline from financially recognizing tickets sold by agents to themselves or their affiliates. The programs merely prevent self-dealing agents from claiming commissions in due course, thereby forcing airlines to assume the costly burdens of individually identifying and screening those tickets. Thus, the conference rule against commissions for self-dealing is designed to reinforce the purpose of the programs to accredit agents for sales to the public, but any carrier wishing to reward an agent for sales to himself or to affiliates can still do so in private arrangements.

BTD's will likely argue that the opportunity for bilateral bargaining for compensation that accounts for their self-ticketing is insufficient because no carrier is willing to compensate self-dealing in any form. If true, this assertion is irrelevant. It also raises the question: what do the BTD's then expect to gain by acquiring the label "travel agents?" Even the CAB acknowledged that it would be wrong for the government to try to force the airlines to pay BTD's.[3]

Unfortunately, both the Board and the Department of Justice have fallen prey in equating "opportunity" with "success" in connection with BTD compensation. Observing that carrier are not generally rewarding self-dealing sales, the Board and DOJ conclude that the market has failed and BTD's need greater opportunity for commissions. But this is not the proper legal test for judging the existence or the fairness of the BTD's bargaining opportunities. While CAB and DOJ theoreticians may believe BTD compensation is a great "innovation",[4] the fact is that there are valid economic and marketing reasons for airlines to resist compensating BTD's and the absence of such payments does not in any way indicate that BTD's lack a fair bargaining opportunity and should be admitted to the agency programs as "agents".

On the other hand, the DOJ view that equates "opportunity" with "success" shows that the conferences are in jeopardy unless S. 764 is enacted. DOJ and the trade association of BTD's have repeatedly warned that antitrust suits can be expected if the BTD's do not get what they want after immunity is withdrawn from the programs.[5]

Will enactment of S. 764 protect travel agents or airlines from competition? No. New agents, with diverse goals and in any size, will be able to enter the industry under the conference programs. Non-agent ticketors can likewise enter under bilaterally negotiated contracts with each airline. Airlines will be free to price and market directly in any manner they chose. Conference agents would thus face a withering array of actual and potential competition under this legislation.

Will the continuation of antitrust immunity result in perpetually thwarting the enforcement of the antitrust laws in this industry? Clearly not. In the first place, any conduct outside the scope of approved agreements, and actions necessary to carry them out, is not covered by the immunity at all. For example, if members of the Air Traffic Conference were to fix prices at an ATC meeting held to amend the agency program, they would clearly be subject to antitrust enforcement. Second, the government agency with continuing jurisdiction over intercarrier agreements can reexamine the competitive operation and effects of the accreditation agreements at any time that circumstances warrant. Thus, the principles of competition embodied in the antitrust laws are not permanently suspended by S. 764—the legislation would simply prevent repeated litigation in the courts about the agreements between administrative reviews of the programs.

---

[3] Additional materials dealing with the arguments made by the National Passenger Traffic Association on behalf of BTD's are attached to this testimony as Exhibits B, C, D and E and are in the committee files.

[4] DOJ defines "innovation" as "change from the existing system or mode of performing services." In DOJ's terms, any change, good, bad or indifferent, can be an innovation.

[5] DOJ has made similar threatening gestures with respect to the basic accreditation standards. Early in the *CMI*, DOJ asserted that the conference agency programs were anticompetitive even if all exclusivity were removed. Although it later claimed to have mitigated its position, threats continue to emanate from DOJ. Depending on who wins the internal debate over DOJ's ultimate position, all participants in conference processes are exposed to antitrust attack if they decide, even unilaterally, to use only conference-accredited agents after 1984.

Finally, will the public be benefited by adoption of S. 764? It clearly will. The Judge who tried the case was intimately and personally involved in testing the evidence presented by all sides during the lengthy hearings. His ultimate conclusions are the best statement of why the Congress should intervene:

"[The accreditation] agreements provide a uniquely integrated marketing system based upon the ubiquitous presence of industry travel agents which represent all carriers and enjoy the confidence of the public and carriers alike in their competence and reliability because of commonly administered accreditation standards. The system enabled by those agreements also undergirds and enables the current system of interlining, and interchangeability and refundability of tickets.

"All of these benefits depend upon the mutual trust of approximately one hundred forty carriers participating in the system and their trust in the competence and reliability of common agents. If the trust and confidence of the participating airlines in the current integrated marketing system are eroded, the costs to the airlines and travel agents would be substantial. The costs to the public and to the public interest would be enormous."

We urge this subcommittee to examine the issues we have raised and report S. 764 for early enactment.

QUESTIONS OF SENATOR INOUYE AND THE ANSWERS THERETO

Question. Even though the CAB's decision abolishes the ATC and IATA exclusivity provisions, and permits business travel departments to become agents, won't ATC accredited travel agents still have a competitive advantage?

(a) If you are an ATC accredited agent, you are the agent for all airlines who are members of ATC, and may therefore sell tickets for all of them;

(b) Airlines will have an incentive to deal with ATC accredited agents, because of the ATC's Area Settlement Plan, which involves a cooperative process of settling accounts with accredited travel agents.

Answer. The thrust of the question is that, notwithstanding the CAB's decision, ATC will continue accrediting agents as it has in the past and thus that accredited agents will have a competitive edge over nonaccredited sellers of airline services. We do not accept the built-in assumption that ATC can continue performing its accreditation function if the Board's decision stands.

We do not believe that the airlines, or agents for that matter, will continue to expose themselves to antitrust attack when trying to maintain and enforce accreditation standards that do not have the government's sanction. It is important to recognize that although the CAB did not formally disapprove most of the individual accreditation rules, it clearly indicated its objections to many of them and is relying on the threat or actuality of antitrust lawsuits to do the job that Congress assigned to the CAB: namely to review and either approve or disapprove the agreements put before it by the airlines.

The loss of enforcement powers, through the combined impact of rejecting all mandatory rules and eliminating antitrust immunity, as well as the compulsion to admit customers (the BTD's) to the conference processes, place the airline and agency industries in a position of risk that few will accept.

Under current industry conditions the balance of benefits and costs of conference participation for many airlines is extremely close. The large carriers that own computerized reservations systems on which the rest of the airlines and most agents depend have apparently already decided to stop helping their competitors obtain access to the market without extracting a heavy price. Their participation in the accreditation conference also confers benefits on their competitors, as the CAB and virtually everyone involved has recognized. The Board's decision increases significantly the cost side of any large carrier's analysis of continued involvement in the agency programs. The most likely result, then, is not that the conferences carry on business as usual; rather, it is more likely that the industry will move to a regime in which most carriers either are foreclosed from cost-effective direct access to much of the market or are forced to pay very heavily for such access by, in effect, purchasing their distribution system from their larger competitors. This cannot benefit the public or the industry.

Even if the assumptions in the question are accepted as true, it does not follow that accredited agents will have a competitive advantage over sellers who are not industry-accredited. While it is true, under the stated assumptions, that conference agents would represent all conference airlines and that nonaccredited sellers would likely represent fewer carriers, the non-accredited sellers will be able to bargain for very favorable credit terms and other benefits from airlines that they do represent. Since these nonaccredited sellers are likely to be much larger than the typical travel agent today, they will be able to use their power to undercut prices charged by accredited agents, to out-advertise such agents, and generally to dominate any market in which they assert themselves. See the attached comments by Ask Mr. Foster, one of the giants in the agency industry.

Thus, competitive advantages and disadvantages will accrue to both sides in such market conditions. Indeed, much of what we have said in the preceding paragraph can occur under Judge Yoder's decision. We expect this kind of intense competitive struggle to arise in many markets. That is why we have repeatedly stated that S. 764, which would restore Judge Yoder's approach, will not protect agents from competition.

The point of S. 764, and the central thesis of Judge Yoder's decision, is that the issue is not one of protecting anyone from competition—the conference programs have produced unparalleled competition. Rather the issue is one of creating the conditions that are essential to continued industry cooperation to produce the "industry travel agent" and all of the competitive benefits that even the CAB found to arise from that concept. Exposing the industry to the full force of the Sherman Antitrust Law, while demanding that the airlines admit their customers into the conference process, is not the way to assure the public that the benefits of the conference programs will continue.

As for incentives, yes, the airlines clearly have incentives to deal with industry agents and to settle with them through the most efficient means possible. But recognize that the Board's decision requires that anyone be given access to the Area Settlement Plan, and thus to Standard Agents Ticket Stock. This is simply an unworkable situation, for the airlines and for the public.

But passing that problem, it is also clear that the airlines have other incentives, not considered by the CAB's one-dimensional analysis, among them the incentive to avoid conferring too many benefits on their competitiors. One way to improve a firm's competitive position is to increase revenues faster than competitors. Another is to try to force your competitor's costs to rise faster than yours. The large carriers with control of computer reservations systems can more readily afford to operate their own agency distribution systems than can their smaller competitors. With evidence of industry disintegration already mounting daily (see attached articles), our position is: Why risk the whole system for the sake of an abstract, theoretical scheme whose practical benefits have not been demonstrated and are not otherwise apparent?

Senator KASSEBAUM. Thank you. Mr. Phillips.

Mr. PHILLIPS. Madam Chairman, I too have an extensive statement which I hope you will put in the record, and I will just briefly summarize for you.

Senator KASSEBAUM. Thank you.

Mr. PHILLIPS. On behalf of the airline industry, I offer these statements.

ATA, through its Traffic Services Division, the Air Traffic Conference, administers a comprehensive travel agency program. The ATC agency program is established by a series of airline agreements, which prescribe rules for the appointment or qualification of industry-approved travel agents, for the reporting and remitting of funds for airline sales, and for the operation of the Area Settlement Plan.

These agreements, because they collectively establish exclusionary rules and impose sanctions, are antitrust-sensitive and require and have received immunity from the antitrust laws, which the

CAB is empowered to give. It is this power which gives the CAB jurisdiction over the program.

In its recent decision on the year's long competitive marketing investigation, the CAB reversed the Administrative Law Judge's carefully reasoned opinion and decided to withdraw antitrust immunity from the program after December 31, 1984. Without antitrust immunity, the airlines will not continue the program in its present form.

The CAB has indicated that the program could be modified to operate without antitrust immunity. In doing so, however, the accreditation standards might become only suggested criteria. The standardized reporting and remitting requirements and the essential centralized follow-up function might have to be abandoned. These and other changes which might be necessary would remove the very heart of the program.

There would be no confidence that the travel agents were technically or financially sound. It is probable that the interline system, which the air traveler has enjoyed for decades, would be severely impacted. The economies of scale which result from the present program would be lost, since each applicant or agent would have to deal with each airline separately, increasing the cost of doing business for these small agencies.

We believe that the withdrawal of antitrust immunity from a program which has served everyone well for almost 40 years is at best, unnecessary and undesirable. CAB's action is particularly confounding since it seems to have been taken for conceptual reasons rather than to solve a real problem.

There were restraints in the program in the past which impacted on the marketing of air transportation. Over the last several years, all those restraints have been removed, in large part because of CAB action. Today there is almost no barrier to the marketing of air transportation, to the opportunity for a customer to get special rates and discounts, and the extra step of the CAB's action will have a negligible impact on the competitive environment.

We therefore urge the subcommittee to recommend enactment of S. 764 in order to preserve the existing travel agency program and to extend indefinitely the antitrust immunity conferred on the underlying airline agreements which established the program.

Madam Chairman, I will be happy to answer any questions as they arise.

[The statement follows:]

STATEMENT OF GABRIEL PHILLIPS, SENIOR VICE PRESIDENT, TRAFFIC SERVICES, AIR TRANSPORT ASSOCIATION OF AMERICA

My name is Gabriel Phillips. I am Senior Vice President, Traffic Services, of the Air Transport Association of America (ATA), which represents the certificated, scheduled airlines of the United States.

ATA, through its Traffic Services Division, the Air Traffic Conference (ATC), administers a comprehensive travel agency program. This program is the subject of the recently concluded Civil Aeronautics Board (CAB) proceeding, generally known as the Competitive Marketing Investigation or CMI. The CAB decision could well have a far-reaching impact on consumers, on the travel agency community, and on the way airlines and other travel suppliers market their services. We, therefore, especially appreciate the opportunity to appear before the Subcommittee in its consideration of S. 764, the "Air Travelers Security Act of 1983".

THE ATC AGENCY PROGRAM

The ATC Agency Program is established by a series of airline agreements which prescribe rules for the appointment or qualification of industry-approved travel agents, for the reporting and remitting of funds for airline sales, and for the operation of the Area Settlement Plan. The program dates to the early 1940s, although modified continually since then. It was developed to provide a pervasive, integrated network of airline services where each airline sold the services of its competitors and where travel agents were appointed to sell on all airlines in serving airline consumers. These important interline sales functions continue today, for over one-third of all travel agency sales involve the services of two or more airlines.

The International Air Transport Association (IATA) has developed a companion appointment system, which is nearly identical to the ATC Program, and virtually all ATC-appointed travel agents also hold IATA appointments. IATA airlines rely on the ATC Area Settlement Plan for processing agent sales reports and remittances. So, our discussion of the travel agency program generally encompasses both the ATC and IATA programs.

Attached to this statement is a description in greater detail of the appointment and reporting/remittance features of the program to give the Subcommittee a clearer idea of how the agency program works. (See the Attachment). The program's detailed rules and procedures are set forth in the ATC Travel Agents' Handbook, which is provided to each travel agent and which has been furnished to the Subcommittee staff.

In exchange for the vigorous rules under which agents operate, the airlines give agents the exclusive third-party right to sell air transportation—that is, airlines will appoint agents from the approved ATC list of agents and only pay approved ATC agents for the sale of air transportation. This right has commonly been termed "exclusivity".

These agreements, because they collectively establish exclusionary rules and impose sanctions, are antitrust sensitive and require and have received immunity from the antitrust laws, which the CAB is empowered to give. It is this power which gives the CAB jurisdiction over the program.

THE TRAVEL AGENCY INDUSTRY TODAY

The travel agency retail sales force is currently comprised of 16,700 agency entities which have over 22,000 office locations in the United States, each of which has been accredited under the ATC Agency Program. The travel agency system is highly competitive and the number of these sales outlets increases by about 2,000 locations or 9 to 10 percent each year. In 1982, travel agents sold about $22 billion in domestic and international airline tickets, an increase of 9 percent over the previous year. For these sales, the agents received about $2.1 billion in commissions from the airlines.

The ATC-accredited travel agent is truly an "industry agent", a status reached under a centrally administered industry system. Once accredited, the agent is automatically appointed by all ATC member airlines unless an individual airline notifies the agent to the contrary. Each appointing airline has executed interline traffic agreements with a great many other airlines. Because of these agreements, the ATC agent is able to sell transportation on virtually any of the world's airlines, whether or not the airline has appointed the agent or serves his or her locale.

This capability obviously works to the benefit of the consumer because it provides the traveler with the opportunity to make all travel arrangements through one office. The central administration, automatic appointment, and interline sales features of the program are equally beneficial to the travel agents and to the airlines because they reduce the number of contracts each would be forced to make with the other absent these agreements.

Moreover, the ATC Agency Program is relied upon by all other suppliers of travel services because there is no other system available. To illustrate the importance of travel agents to these other travel service suppliers, the average travel agency business mix is approximately two-thirds airline sales and one-third other travel services. Extrapolating from 1982 airline sales, travel agents sold more than $10 billion in other travel services. These include the travel services of bus lines, cruise lines, hotels and motels, railroads, rental car companies and tour operators.

THE CAB'S COMPETITIVE MARKETING INVESTIGATION

The CAB instituted in September 1979 a review of the ATC Agency Program to make sure that there was adequate competition in the retail distribution of airline services. It undertook this review even though none of the interested parties—the Congress, the public, the airlines or the travel agents had expressed dissatisfaction with the system. Ironically, as the CAB itself has recognized, the agency program has facilitated airline deregulation and increased competition by permitting new airlines instant access to the industrywide distribution system without the necessity or cost of establishing expensive, separate sales outlets of their own. Moreover, the travel agency community was already highly competitive, as is dramatically attested to by the rapid growth in numbers of new agency locations.

After several years of comprehensive hearings, an enormous case record, and a reasoned decision by the Administrative Law Judge, which the airlines and the travel agents supported, but which large corporate travel departments opposed, the CAB issued its decision at the end of last year and confirmed it in March 1983. The CAB departed from Administrative Law Judge Ronnie Yoder's decision in two major respects. First, while it approved the ATC Agency Program, including the Area Settlement Plan, it granted antitrust immunity only until December 31, 1984, the date the CAB is to sunset under the terms of the Airline Deregulation Act of 1978.

Secondly, the CAB approved the ATC exclusivity provision only as it pertains to interline sales and then only until December 31, 1984. ATC member airlines would be free to appoint agents for on-line sales outside of the Conference system until that time, and for interline sales thereafter.

Judge Yoder concluded that it was desirable to retain agency exclusivity, meaning that airlines would employ only ATC-appointed agents as non-airline sales outlets. However, he disapproved marketing exclusivity, which means that airlines could also use other sources such as Ticketron for ticket distribution. Also, he would have granted antitrust immunity to the program for an indefinite period.[1]

While efforts are underway to challenge the CAB decision in Court, the decision is in effect today. Accordingly, the ATC has had to act to change its rules to conform to the CAB decision. Although ATC airlines have individually indicated their intention to continue to use the services of ATC-appointed agents, and not to appoint sales intermediaries outside the Conference system, ATC has had to accommodate that possibility in its rules.

In April, the airline members of ATC adopted changes that would allow an ATC-approved agent to be also an on-line sales intermediary, provided that such on-line activity was carried out at a separate location and provided, also, that the agent did not hold out at that separate location that it was acting as an approved ATC agent. Furthermore, airlines could only place ticket stock with sales intermediaries which state that the ticket may not be used, exchanged or refunded except on the issuing airline. These rule changes have been submitted to the CAB for approval but have not been acted on by that agency.

Changes in the ATC Agency Program and related agreements since the Deregulation Act was enacted already have made the marketing of air transportation extremely competitive—so much so that the Board's decision adds very little additional competitive opportunity and a great deal of potential harm. A brief recital of these changes will illustrate the point, particularly as it relates to competition.

In 1979, the CAB held in the Transmark-General Mills case that a travel agent's payment of expenses of the customer's employees at an in-plant location was not a rebate and, therefore, not illegal, thus offering the corporate customer the opportunity for some measure of beneficial service.

That same year, when the CAB initiated the Competitive Marketing Investigation, it ordered an end to Conference-fixed commissions. The average domestic commission rate climbed from about just under 8 percent to almost 10 percent where it has held for almost two years.

In 1981, the CAB did away with the requirement that fares had to be filed for approval with the exception of the standard coach fare. On January 1 of this year, all government regulation of domestic airline fares disappeared. Both actions have allowed airlines to set any special fare they wished including special fares for customers purchasing volume travel and allowed agents to sell at retail at any price, including a rebated price, if the agent's principal agreed.

Moreover, airlines are free to place their own ticket stock in individual agencies and in customer premises under whatever special arrangements they desire. The retail marketing of air transportation is already virtually unfettered. The CAB did not have to alter the agency program, as it did in its decision, to stimulate further competitive initiatives in retail marketing.

---

[1] The Subcommittee may wish to compare the different treatment of antitrust immunity by Judge Yoder, is his initial decision at pages 207–212, and by the CAB itself in its order at pages 120–137.

Yet, the CAB chose to encourage development of some new type of sales intermediary, as yet unknown, which can radically change an already significantly altered travel agency program. This industry program as constituted before the CAB decision provided enormous benefits to everyone affected by it. The traveling public has learned to rely on the professional travel agent for unbiased counseling on the best service and lowest prices for both air travel and ground arrangements. The appointment and retention standards have ensured a degree of professionalism and reliability important to the consumer, the travel agents and the airlines without unduly restricting entry. Ninety percent of all applicants are approved and the agency list, as noted, has been growing by some 2,000 new locations a year.

The system, as a whole, provides the confidence to ensure that an agency generated ticket will be honored by all airlines and that the public will be protected from fraudulent and shoddy operators.

Both the airline industry and the travel agency community fear that the CAB decision will result in the development of special airline/agency relationships outside of the Conference system to the net detriment of the industry, agencies and the traveling public. The concern is that special tie-ins between agent X and airline Y will become pervasive; once these practices start, competitive pressures will force other agents and other airlines to enter into similar arrangements. Before long, instead of the current system of agencies representing all airlines, agents will become the exclusive representatives of individual airlines. Other airlines will question whether such agents can fairly sell their service; consolidation of agents will occur to enhance agent bargaining power; the public will lose the benefit of one-stop travel services, and of agent impartiality in seeking out the lowest fares and best services.

And today, in this deregulated environment, the agency system is the linch pin which holds the interline system together. If the industrywide agency system falls apart through extensive development of on-line sales intermediaries, i.e., exclusive agents of individual carriers, there will be less and less incentive for carriers to complement and coordinate their services. Interlining is expensive—new entrants, in order to keep their costs lower than established carriers, are avoiding interlining and putting competitive pressure on those established carriers. The changed distribution system of exclusive agents would further discourage interlining.

Moreover, with the loss of antitrust immunity at the end of 1984, we doubt that the program could continue in its present form. The risk to the airlines and the cost of defending probable antitrust suits would just be too great, as Judge Yoder recognized in his initial decision. Such suits would arise from disappointed applicants, travel agents and persons who might be denied a special arrangement which they sought from an airline. In the past, antitrust complaints filed by persons dissatisfied by actions under the program have been dismissed because the program has been operated strictly in accordance with the CAB-approved agreements. It is our studied conclusion, however, that without antitrust immunity the risks involved would be too great and the potential cost too heavy for the airlines to continue the current program. And the travel agency community would lose its ability to have any say in fashioning the program.

The impact of considerations such as these can be illustrated by the Office of the Travel Agent Commissioner, whose function since 1977 has been to provide impartial decision making and procedural fairness for applicants and agents in selection and retention matters. In performing this mission, the Commissioner is vested with the ultimate authority to approve or disapprove applications for accreditation and to impose penalties on accredited agents for breaches of their agreement with the air carriers, including fines and the power to suspend or terminate an agent's accreditation. The continuing importance of this office as a cog in the wheel of the total agency program has been recognized by the Civil Aeronautics Board and all segments of the industry.[1]

If antitrust immunization is lost this is the type of activity which, despite its benefits, the airlines would be compelled to consider terminating completely in view of its particular vulnerability to antitrust action. Moreover, even if the Commissioner's office or its equivalent could be continued in some modified form, the Conference would be greatly disadvantaged in finding and retaining a competent and qualified person willing to serve as Commissioner in view of the constant personal exposure to the threat of antitrust litigation.

---

[1] CAB Order 79-11-21, Docket 33451, November 1, 1979.

The CAB indicated that the program could be modified to operate without antitrust immunity. In doing so, however, the accreditation standards might become only suggested criteria. The standardized reporting and remitting requirements, and the essential centralized follow-up function might have to be abandoned. These and other changes which might be necessary would remove the very heart of the program.

There would be no confidence that travel agents were technically or financially sound. It is probable that the interline system, which the air traveler has enjoyed for decades, would be severely impacted. The economies of scale which result from the present program would be lost, since each applicant or agent could have to deal with each airline, separately—increasing the cost of doing business for these small agencies.

We believe that the withdrawal of antitrust immunity from a program which has served everyone well for almost 40 years is at best unnecessary and undesirable. The CAB's action is particularly confounding since it seems to have been taken for conceptual reasons rather than to solve a real problem. In short, the CAB has attempted to fix something that isn't broken.

We, therefore, urge the Subcommittee to recommend enactment of S. 764 in order to preserve the existing travel agency program and to extend indefinitely the antitrust immunity conferred on the underlying airline agreements which establish the program.

[Attachment]

SUMMARY DESCRIPTION OF ATC AGENCY PROGRAM APPOINTMENT AND REPORTING PROVISIONS

I. ATC ACCREDITATION OF TRAVEL AGENTS

The ATC member airlines have collectively established a series of objective standards for the initial selection, or accreditation, of prospective travel agents and for the continuing retention by those persons of ATC accreditation. The accreditation and subsequent follow-up processes are conducted by a headquarters staff of ATA employees.

The initial accreditation standards include the following major requirements which must be met by each applicant and which must continue to be met after accreditation:

A place of business which is open to the public at least 35 hours per week for the promotion and sale of passenger transportation and general travel services;

Arrangements for the secure storage of tickets and ticketing equipment;

An experienced full-time manager;

The same, or another, full-time employee with ticketing and other technical experience;

A bond of $10,000 at minimum to protect airline ticket stock.

The applicant provides this and other related information to the ATC which verifies for accuracy and determines that the standards are met. If so, the applicant is included on the list of ATC accredited travel agents. He or she is automatically appointed by all ATC member airlines as their legal agent unless an airline notifies the agency to the contrary, and is eligible to sell transportation on those and other airlines and to receive commissions from them. The new agent is provided with blank tickets by the ATA staff and obtains other equipment from the airlines and from equipment vendors.

Applicants which are denied automatic accreditation may appeal their case to the office of the Travel Agent Commissioner, whose decision is binding on the carriers. If the applicant is dissatisfied with the Commissioner's decision, the applicant may carry his appeal to an arbitration tribunal for resolution. These processes are also utilized in the case of certain rule infractions by accredited agents.

Essentially the same accreditation procedures are followed in the event a travel agent wishes to open a branch office location and the same appeal processes are available in such instances.

II. REPORTING OF AND REMITTING FOR TICKET SALES—THE AREA SETTLEMENT PLAN (ASP)

The reporting of and remitting for ticket sales is accomplished through the second part of the ATC agency program, the Agent's Standard Ticket and Area Settlement Plan or ASP. Although individual airlines may provide their agents with the airline's own ticket stock and make separate arrangements for the reporting and remitting of ticket sales, the preponderance of all sales by U.S. travel agents is made through the ASP.

All travel agents are provided with standard, blank ticket stock instead of the separate tickets of each appointing airline. When a ticket is sold, it is imprinted with the name and identification of the travel agency and the name of an airline, generally a carrier which participates in the transportation. The ticket then becomes a legal document of that carrier.

Once each week, the agent sends the auditors coupons of all tickets issued that week to a designated area bank/data processing center. The agent's geographical location determines the center which is used.

The centers serve as clearing houses for the weekly reports from a large number of agents. The centers prepare a sales report for each travel agent, determine the amount of money owed to each airline whose name is imprinted on the ticket, draw a check against the agent's bank account for the aggregate amount owed by each agent (after deducting commissions), remit the amounts to the appropriate airlines, forward the auditors coupons to the airlines and return the sales report to the travel agent. The centers check for the timely receipt of the agents submissions, the accuracy of computations and the numerical sequence of tickets on each report. They do not otherwise audit the tickets. Questions related to fares, commissions claimed and the like are handled between the agent and the individual airlines.

There are presently six area banks/processing centers in the United States which operate under contract with the ATC. In 1982 the area banks processed a total of 125 million documents, a 17 percent increase over 1981.

The Area Settlement Plan is available for utilization by virtually any air carrier. At the present time, 159 airlines participate in this part of the ATC agency program.

In addition to the requirement that travel agents report ticket sales on a weekly basis, the airline agreement also provides that repeated late remittances or other financial irregularities, short of actual defaults, will result in sanctions applied to the agent. The sanctions result either from a complaint filed with the Travel Agent Commissioner by the ATA staff or through a written settlement between the ATA and the offending travel agent. The sanctions may include termination of the agents accreditation, suspension of the accreditation for a period of not more than ninety days, a fine of not more than one-thousand dollars, etc.

In the event a travel agent does not submit his weekly report within ten days after the close of the sales report period, or if the check drawn on the agents account by the area bank is dishonored, the ATA acting on behalf of all carriers will withdraw all tickets and identification plates from the travel agents. Unless the amount due is paid within thirty days, the ATC accreditation of the agent is withdrawn and the agent's ability to sell domestic air transportation on behalf of the ATC member carriers is terminated. Special provision is made for agents who can pay a part of the amounts owing so that they may stay in business and satisfy the remainder of the debt over a period of time.

Last year there were 254 agents declared in default on behalf of the carriers, owing them approximately $13.8 million.

Senator KASSEBAUM. Thank you very much.

Mr. Santana.

Mr. SANTANA. Thank you, Madam Chairman. I have submitted my full testimony, which I ask to be inserted in the record.

First, I would like the record to show that contrary to Chairman McKinnon's belief, the travel agent never had, nor does he wish, a monopoly in the sale of air transportation. There has always been a very active and charged competition between agents and carriers under a dual distribution system.

Furthermore, by virtue of the Airline Deregulation Act of 1978 in and of itself, without any help from the Board or the CMI, a whole new category of distributors such as barterer, part chart operator and bulk fare dealer, was made legal and added to the competitive mix. The Competitive Marketing case does not alter these facts.

Similarly, we are not here as opponents of airline deregulation, though recent actions by at least one carrier may force a re-evaluation of the concept of total deregulation of our vital air transportation system.

It has long been the public policy of the United States that we would be best served by a competitive yet integrated air transportation system. Coming as a direct result of this public policy has been a demand for impartiality by agents. An integral part of the industry's sales agency agreement is the requirement that agents represent each airline impartially in fulfillment of its service role to the public.

This carrier-imposed requirement has continually been supported by the CAB and others. The question of whether an agent would lose his impartiality was the single most critical issue before the administrative law judge and the CAB in the IATA commission investigation. It arises again in the computer bias issue.

If you wish this principle of impartiality to be maintained, you must insure the continuation of the joint agency program, for it is safe to assume that if the agency system falls, or if a second category of agent is permitted, the natural result will be that individual agents will become so tied to particular carriers that impartiality would be impossible.

It is our firm conviction that both rational airline deregulation and an integrated air transportation system, including interline ability, impartiality, standards, and full service, can stand side by side in the public interest.

During this regulatory transition period, it has been the ability of the working travel agent to cope with the challenge of change that has given deregulation whatever success it has achieved. His being a part of the industry system has been a critical necessity. This has enabled the public, to the extent humanly possible, to be made aware of all the options and alternatives available to it in its selection. This has helped the public to survive through this chaos of the Continental bankruptcy.

While antitrust enforcement may be a means to force the competition between big business, exemption from such enforcement is an absolute necessity by our small businesses to enable us to maintain a viable position in the marketplace. Without it, the inevitable result will be concentration and fewer independent, impartial retail travel agency businesses.

We have submitted for the record a profile of the travel agency community, and this shows that over 90 percent of the agents do a volume of less than $2 million per year. This is still very small business. More than 69 percent do less than $1 million a year.

There can be no doubt that without antitrust immunity, the joint agency programs cannot be maintained. Regardless of what legal theorists or others may wish you to believe, it will be immaterial whether a resultant program actually violates the law. The controlling factor will be one of perception and possible exposure to litigation.

Airline litigation costs conceivably could be recovered through higher airfares. Travel agents' litigation costs could not. They have no such option.

Thus far, everyone has taken the travel agent for granted. However, I say here and now that I do not believe that travel agents should or would participate in an industry program lacking antitrust immunity, even if the carriers were to try to maintain some semblance of a program.

Similarly, it would be equally foolish for agents to voluntarily participate in a program having immunity but failing to contain standards and rules equally applicable to all fulfilling the prescribed role. The lack of mutuality would so severely reduce the benefits of the system that its value to the public and agents would be rendered meaningless. It is for these reasons that we support enactment of S. 764. Thank you.

[The statement follows:]

STATEMENT OF RONALD A. SANTANA, PRESIDENT, ASSOCIATION OF RETAIL TRAVEL AGENTS

My name is Ronald A. Santana and I am President of the Association of Retail Travel Agents (ARTA), a national association composed of over 1,800 appointed retail travel agencies located throughout the United States. We also have over 1,200 individual travel agents as members. I am also the owner of two travel agencies in the New York City area. In addition, I am an attorney admitted to practice in New York.

The term "retail travel agent" is defined by the Association to mean an agent who deals on behalf of his or her principals (carriers and other suppliers) with the public at large, rather than one who acts as a tour operator or tour packager (wholesaler). The typical travel agent (we use this term, though it must be recognized that there really are no two travel agents who are exactly alike) provides a wide range of services to the public in connection with domestic and foreign travel, and is an important part of our consumer-oriented competitive system of commercial air transportation.

At the outset, it is important to note that the travel industry is truly a "small business" industry. Over 98% of travel agency locations experience annual volume sales of under $5 million. Indeed, more than 95% of all agencies have volume sales of under $3 million and 70% are under $1 million gross annual sales. In fact, fewer than 2% of the travel agency locations enjoy sales of over $5 million a year. The accompanying chart in Appendix 1 illustrates the unequivocal dominance of small businesses in this industry.

Travel agents engage in the marketing, promotion and sale of air transportation services. These encompass all the promotional activities from media advertising to group organizing and selling the product. These activities can be termed incremental because in many cases, while the passenger may have traveled anyway, he or she very likely would not have traveled on that carrier, to that destination on that day.

Travel agents are in the service business and provide the client with particular and impartial travel-related services that meet his or her needs. Included within this role are all those services such as responding to questions on air arrival and departure, quoting air fares, etc., regardless of whether the person is an actual client. The client may have originated from the agent's selling activity or, may have called upon the agent to meet a specific need.

By providing impartial advice and information to the consumer about available transportation alternatives, travel agents promote air carrier competition and benefit the public. Competition is enhanced when consumers have ready access to sufficient information to select from among competing alternatives. For this reason ARTA has opposed deliberate computer bias that inhibits the agents' ability to provide impartial service. ARTA was the first to call for a Civil Aeronautics Board investigation into reservation computer bias.

We are not here as opponents of airline deregulation. To the contrary, well before it became fashionable, ARTA was filing petitions at the CAB calling for it to allow the marketplace to control the economic relationship between the agency industry and airlines. However, as with any good concept, specific pieces of legislation do not always fulfill their purpose when implemented by humans. Such is the case with the Airline Deregulation Act of 1978, which in our judgement has been misinterpreted by the Board in its Competitive Marketing Investigation Order of December 1982.

Traditionally, ARTA has pressed for changes in Conference rules that would enable individual agents to maintain a more competitive stance in the marketplace. Accordingly, ARTA was the first association to demand that Commission policies be taken out of Conference jurisdiction and be opened for individual carrier/agent negotiations. ARTA continues to maintain that all economic matters between the carrier and agent should be pursued through direct bilateral negotiations and should not fall under Conference jurisdiction.

ART has also consistently been committed to both open entry into the travel agency business and high professional standards.

It has long been the clear public policy of the United States that our Nation would be best served by a competitive yet integrated air transportation system. A system where the passenger and, if he is fortunate, his baggage can move from one end of the country to the other freely and easily, using the services of several airlines. The reason for this public policy are both public convenience and national defense. The original development of the joint agency program was very much based on meeting this public policy.

Travel agent programs today are operated by the Air Traffic Conference (ATC) and the International Air Transport Association (IATA). Air carrier members of these organizations have entered into agreements which provide for the accreditation and joint appointment of travel agents throughout the United States. Most travel agents are accredited and appointed by both organizations. The joint appointment of travel agents offers benefits to the public. Once a travel agent is appointed by either ATC or IATA, that travel agent represents all conference carriers participating in the program. Non-conference carriers that participate in the jointly sponsored and related standard ticket plan will have ready access to travel agent services. This means that the travel agent can arrange for travel on any participating airline. Thus, a traveler in Topeka, Kansas, through a travel agent, has direct access at a single convenient location to air carriers operating in other parts of the country, e.g., Air Florida or Aloha Airlines.

A passenger can make all of his or her air travel arrangements through a local travel agent and be assured of service. Travel agents are in a single position to assist the public in making objective selections from available air transportation alternatives. Travel agents provide information on rates, routes, and quality of service. With the proliferation of new carriers and routes following the 1978 Airline Deregulation Act, the public has increasingly relied on travel agents. The entire system of competitive air transportation benefits from increased public access to information.

Properly conceived and well-administered industry-wide agency programs enhance the competition at the consumer level. This occurs because these industry-wide programs provide a speedy, and inexpensive means for the qualified individual entrepreneur to enter the travel agency business and represent the entire air transportation system. Similarly, an agency program provides all carriers, especially new carriers, with immediate national market penetration at minimal cost. Thus, both agents and carriers are in a better position to compete effectively in the marketplace. The joint agency programs have been of particular importance to new carriers trying to compete in established markets as well as established carriers trying to break into new markets. The benefits of these programs in terms of widespread consumer interest and the overall growth of the travel industry are already a matter of historic record.

It is important, however, to project into the future and briefly analyze the situation that would face the consumer if such industry programs were to end. Individual carriers in selecting their individual agents would most probably restrict the number of such agents, depending upon costs of selection and service, as well as other factors. Necessarily, smaller carriers would have fewer agents than larger carriers, would have fewer agents than larger carriers, and in both cases it is safe to assume that preferences would be given to the larger agents. The end result would be that smaller agents, who today represent the overwhelming majority of the industry, would then be forced out of business. The total number of individually-owned small travel agencies throughout the country would be significantly reduced. Unlike today, not only would this limit public access to the various services provided by the agent, but it would directly limit public access to the various carriers. Additionally, because of the decrease in the amount of incremental business generated by even the smallest agents which fill otherwise empty seats, carrier revenue would be proportionately reduced and air fares would be proportionately increased.

We now have a transportation system which largely depends on the interchangeability of carrier documents and various carrier interline agreements. The functioning of this system further depends upon the mutual selection and acceptance of the carriers' agency representatives. Absent such an industry-wide agency program, not only would the agent's ability to provide adequate services to his client be impaired, but also it is entirely probable that down-line carriers, especially those in foreign lands, would refuse to honor tickets written by agents with whom they had no working relationship. Even in an era of deregulation, commercial air transportation is different from other industries. The public needs and expects commercial aviation to function as an integrated system. Only through joint agency programs can the public have immediate access to the system. The jointly appointed agent is an integral part of the system. I do not believe that I am exaggerating in saying that there is a likelihood that the absence of a joint industry-agency program would result in the demise of the air transportation system as we know it today.

Travel agents are indeed agents of the carrier. They represent and act on behalf of each air carrier participating in the program. They are compensated by the carriers. When a travel agent issues an airline ticket, it will be honored by the carrier as if that ticket had been directly issued by the carrier.

Air transportation is a "big ticket" item. Access to an impartial agent representing practically all domestic and international air lines is of great importance to the traveling public. Because jointly appointed agents may represent all carrier participants in the ATC and IATA programs, they can provide impartial service. If the joint agency programs are allowed to terminate, they will likely be replaced by a system of individual appointments, and the impartiality that the public now expects would be gone.

The joint agency appointment system is of critical importance with regard to international air travel. Not only are travel agents agents for every domestic carrier by virtue of the ATC appointment, but if those agents also have IATA appointments, they can book passage on international carriers all over the world. Thus, a traveler can deal with his or her local travel agent and make complete arrangements for international travel without having to deal with dozens of carriers on an individual basis. That traveler in Topeka has the same access to international air carriers by virtue of the travel agency program as does the traveler in New York City.

Public satisfaction with the convenience and service provided by travel agents has been well-documented. In 1975 ARTA, the American Society of Travel Agents (ASTA), the American Automobile Association (AAA), The Association of Bank Travel Bureaus (ABTB), American Express Company, and air carrier groups sponsored an objective study of the travel agent industry by the independent firm of Touche Ross and Company. In 1978 Touche Ross and Company issued its detailed report. The report included the results of a sophisticated survey of 2,000 air travelers. Travel agents received "high ratings on the quality of the services performed." Pertinent portions of the report are appended hereto. That study continues to be regarded as the most accurate and objective view of the travel agent industry as seen by the traveling public now available.

Public dependence on travel agents has increased greatly since passage of the Airline Deregulation Act of 1978. New air carriers have been formed, new routes are being flown, and there is a wide variety of fares available to the public. Through local travel agents, the public now has access to over 14,000 commercial flights originating each day at U.S. airports. The public is making greater use of travel agents to help sort out the ever increasing number of air travel options available.

Not only does the joint agency appointment system provide the public with access to a large number of carriers at a single location, it provides each participating air carrier with over 21,000 marketing outlets throughout the United States.

These travel agency outlets not only provide convenience to the public, they promote air transportation. The 1978 Touche Ross study documents that travel agents promote air transportation and tourism. The full range of agent activities is discussed in the pertinent portions of the Touche Ross report appended hereto. The United States has the best and most extensive system of air transportation anywhere in the world. Travel agents are an important part of our integrated system of commercial air transportation. They are important to the interline system, under which a passenger can secure coordinated through transportation on any number of connecting air carriers.

The Airline Deregulation Act of 1978 was passed for the purpose of allowing greater competition between commercial air carriers. The travel agent system has been instrumental in promoting that competition. When a new carrier becomes certificated or an existing carrier begins operation on a new route, that carrier through the existing network of travel agents, can immediately market that new service throughout the United States. Small air carriers with limited resources are in a position to market their service directly to the public on the same basis as larger and more powerful air carriers. This market access provided by travel agents promotes competition within the airline industry and aids the consumer. Not only does the traveler in Wichita have access to Aloha Airlines through the travel agency system, but Aloha Airlines can market its service throughout the United States by participating in the joint agency program.

Travel agents provide an important public service in assisting the public in selecting from among the ever-increasing number of air travel options. Competition is most effective when the public has easy access to accurate information as to what is being offered at what price. Joint travel agency programs have helped to make competition between the air carriers more effective than it would be in the absence of these programs.

In order for a travel agent to be accredited by ATC or IATA, certain minimal standards must be met. These standards are intended to ensure that a new travel agent has sufficient knowledge and experience to ensure that the public can be adequatley served. It is important to note that the Justice Department conceded to the Civil Aeronautics Board in its closing argument in the Competitive Marketing Investigation that the standards are reasonable and do not unduly restrict entry into the travel agency business.

As common carriers, the nation's airlines must accurately represent to the public the service they hold themselves out to perform. Travel agents are the legal extension of the carrier and bind the carrier to provide service as if the carrier itself had written the ticket. Air transportation should not be treated the same as durable consumer goods. A spoiled vacation cannot be returned to the store for a refund like a defective toaster. We believe that a system which allows for reasonable standards for the accreditation of travel agents and which does not unduly restrict entry into the field are clearly in the public interest.

If deregulation is to reach its desired conclusion, it is absolutely necessary for the public to have access to proper information. Only the maintenance of some reasonable qualification standards for those dealing with the public can provide this safeguard. As competition makes the system more complex with more fare and other options being offered, the maintenance of such standards becomes even more important.

Having standards for the appointment of travel agents also serves another important function. As already noted, over 95% of all travel agents are small businesses. Over half are owned or managed by women. Approximately 12% are "minority-owned". Because it is essentially a service business, capital requirements are relatively small. The typical ARTA member travel agency has from 3 to 5 employees and the owner is usually a working agent. Although the failure rate for new small businesses generally is quite high, the Small Business Administration has indicated that the failure rate for new travel agencies is relatively low. Requiring some knowledge of and experience in the travel business prior to accreditation as an agent not only improves service to the public, but it increases the success rate of those small businesses.

The termination of joint agency programs will require each agent to seek a separate appointment from each carrier. This will substantially increase the costs of entry and lead to a high degree of concentration. Only the largest and best financed travel agents would be able to secure the multiple appointments now equally available to all agents. The public will no longer have the same range of services currently available in local travel agencies.

Any suggestion that accreditation standards have in any way limited entry is plainly belied by the statistics. The number of accredited travel agents has more than doubled in the last 10 years. Over 500 new agency locations have been added so far in 1983. There are now more than 21,000 travel agencies located throughout the United States and they account for over 60% of domestic airline ticket sales and over 75% of international ticket sales. In recent years there has been a large increase in the number of travel agencies. No one can seriously suggest that the standards requirement serves as a barrier to entry. The numbers of small and minority-owned travel agencies attest to this fact.

The ATC and IATA joint agency programs were thoroughly analyzed in the Civil Aeronautics Board Competitive Marketing Investigation. There were weeks of hearings, thousands of transcript pages, stacks of documentary evidence, and exhaustive briefs. Administrative Law Judge Yoder presided at the hearings, reviewed all of the evidence and issued an initial decision. Essentially, Judge Yoder found that the joint agency programs served the public well and were not unduly anticompetitive. Indeed, because of the market access given new carriers through the program and the ease of entry into the agency business, the programs actually fostered and enhanced competition.[1]

---

[1] The courts have recognized that joint industry agreements which might at first appear to be anti-competitive may in actual operation promote competition. See *Broadcast Music, Inc.* v. *Co-*

Continued

Judge Yoder did not give the existing programs his unqualified blessing. His decision would eliminate or modify numerous features of the agency programs thought to be unduly restrictive or unnecessary. For example, the initial decision would have enabled restrictions on agency locations. Moreover, the initial decision specifically provided for non-agent marketing outlets in addition to appointed travel agents. Other suggestions for change, including some from ARTA, were rejected by Judge Yoder.

The initial decision would have approved the agency agreements as modified and granted the necessary antitrust immunity under sections 412 and 414 of the Federal Aviation Act. On balance, it represents a reasoned compromise acceptable to ARTA and others in the travel industry.

On review, the Board rejected Judge Yoder's decision and issued a final decision that would effectively terminate all joint agency programs at the end of next year. The Board acted principally at the urging of its staff and Justice Department lawyers. Although a number of groups requested modification of the Yoder decision, the only non-government group to oppose the concept of an approved industry-wide agency program was the National Passenger Traffic Association (NPTA), an organization comprised of large corporate travel departments.

For many years NPTA has been attempting to require that the carriers accredit corporate travel departments and pay commissions as travel agents. However, as Judge Yoder found, corporate travel departments are buyers of air transportation, not agents of the seller. Moreover, under the Airline Deregulation Act of 1978, corporate travel departments may lawfully negotiate directly with air carriers for special fares, discounts, and rebates. As a practical matter, corporate travel departments may now obtain the economic advantage they have been seeking for many years. It is difficult to understand why NPTA continues to seek the demise of the agency programs in their entirety.

NPTA is not satisfied that its members may now obtain economic advantages by direct negotiations with the carriers. It wanted the Board to require that its members receive an economic advantage not available to others in the form of commissions. Absent agency programs, the majority of travelers not represented by corporate travel departments would be the losers.

No one seriously suggests that the agency accreditation standards are unreasonable. The public benefits flowing from the agency program were even acknowledged by the Board. Nevertheless, the agency agreements would probably be considered a per se violation of the antitrust laws, since the agreements require the carriers to only deal with accredited agents, i.e., they could be considered a collective refusal to deal. The Justice Department has so characterized the agreements. Carrier participants and perhaps even agents could be subjected to criminal sanctions and treble damage actions. Because the per se rule does not require proof that a particular practice is unreasonable, even a patently unqualified applicant whose accreditation was denied would likely prevail in an antitrust suit.

Absent passage of S. 764, the joint programs will surely die. Numerous carriers have made it clear that they will not participate in any joint agency programs without government approval and antitrust immunity. The risk of an antitrust action either by the Department of Justice or a private plaintiff is simply too great. The large carrier, those in the best position to market their services without an agency program, would likely be the first to withdraw. And, without the large carriers, the program would become meaningless. In addition, the risk if an antitrust suit to a travel agent is unacceptable. The cost of defending such an action, even a frivolous one, could be enough to bankrupt most small businesses. We would recommend to our members that they carefully consider their participation in the joint programs.

The question has been asked why the airlines should have antitrust immunity for their travel agency programs while other industries do not enjoy such immunity. Air service is now the principal means of intercity transportation available to the public. Unlike other industries, competing air carriers are expected to function as an integrated system. This system is manifested in such things as interline and baggage agreements. The travel is the public's main point of contact with the system in its entirety. All of the available combinations and alternatives are presented. No other industry functions in quite the same systematic manner as does commerical aviation.

The joint agency programs allow for an ongoing dialogue between carriers and agents. Representatives of ARTA and other trade associations of travel agents regularly meet with representatives of carrier organizations to discuss matters of

---

lumbia Broadcasting System, Inc., 441 U.S. 1, 16–23 (1979); *United States* v. *Realty Multi-List, Inc.*, 629 F. 2d 1351, 1366–1369 (5th cir., 1980).

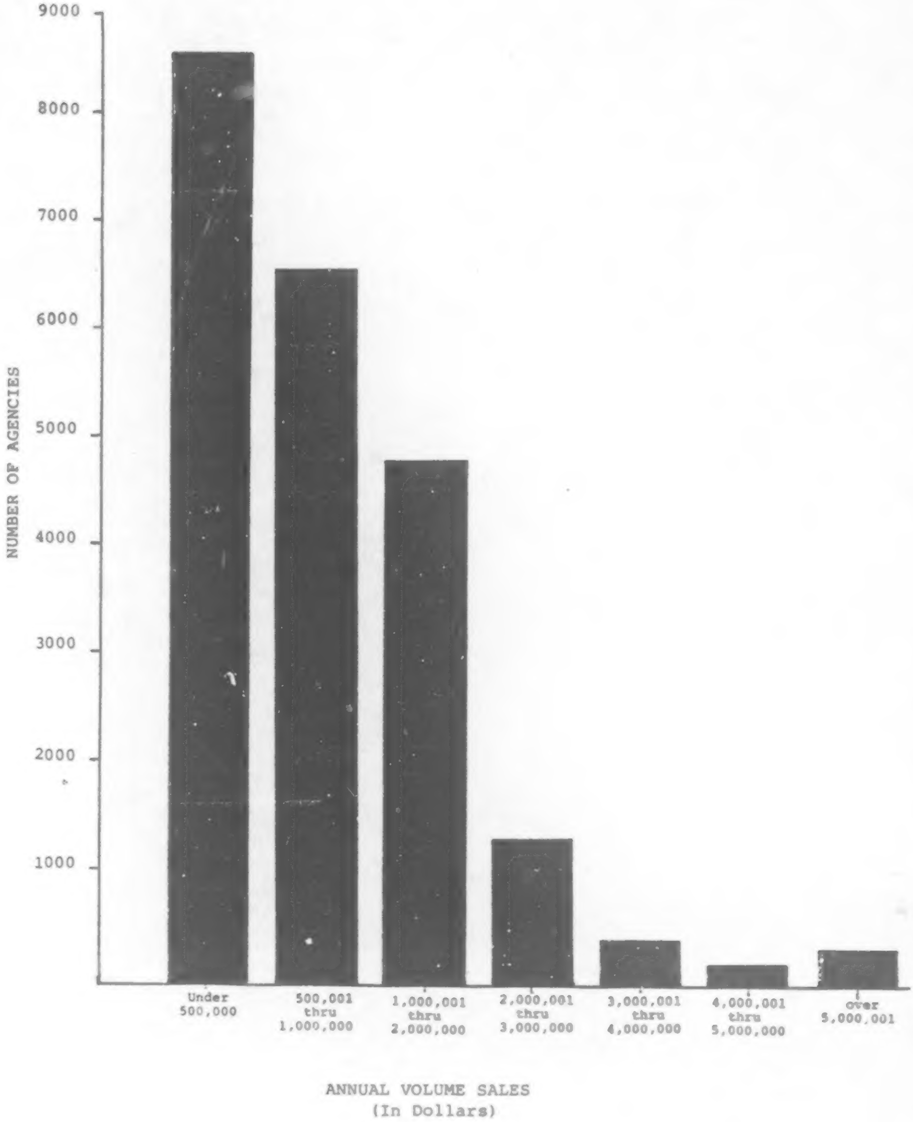
common concern arising under the agency agreements. These joint working sessions allow for the smooth running of the program. Antitrust immunity is necessary for this dialogue to continue. Without such immunity association officials and others would be reluctant to participate in any industry-wide program. The fear of an antitrust action is real and would effectively lead to the termination of programs that serve the public well.

We strongly urge the Congress to enact S. 764, "The Air Travelers Security Act of 1983." This bill would adopt the decision of Judge Yoder as the final decision in the Competitive Marketing Investigation. It would allow for the continued approval and antitrust immunity under Sections 412 and 414 of the Federal Aviation Act for the industry-wide travel agency programs.

APPENDIX 1

Annual sales	Number of agency locations	Percent of total
Under $500,001	8,511	39
$500,001 to $1,000,000	6,501	30
$1,000,001 to $2,000,000	4,508	21
$2,000,001 to $3,000,000	1,171	5
$3,000,001 to $4,000,000	399	2
$4,000,001 to $5,000,000	199	1
Over $5,000,000	374	2
Total	21,663	100

APPENDIX 1


9000
8000
7000
6000
5000
4000
3000
2000
1000
NUMBER OF AGENCIES
Under 500,000
500,001 thru 1,000,000
1,000,001 thru 2,000,000
2,000,001 thru 3,000,000
3,000,001 thru 4,000,000
4,000,001 thru 5,000,000
over 5,000,001
ANNUAL VOLUME SALES
(In Dollars)

Senator KASSEBAUM. Thank you very much.

Mr. MEREDITH. Madam Chairman, I appear with Mr. Bart Rein, attorney for IATA. I have a long statement which I would ask if you would insert in the record, and if I may, I would like to summarize the main points now.

I represent today the International Air Transport Association, IATA, the worldwide trade association whose membership is comprised of 120 air carriers providing scheduled international services. For the past 40 years IATA has developed and administered passenger and cargo agency accreditation and retention programs. There are now some 35,000 IATA agents worldwide, with approximately 22,000 located in the United States. And all of these are authorized to sell international services on all IATA carriers, including both online and interline services.

International carriers serving the United States are vitally dependent on the dispersed low cost agency distribution system provided by the IATA programs. Approximately 80 percent of all sales of international services in this country are made by IATA-accredited agents.

In the Competitive Marketing Investigation, the CAB has evaluated these programs and found them to be of great value to the carriers and to the traveling and shipping public. In our view therefore, the CAB's failure to confer antitrust immunity has placed these programs and participants at risk because the agreements are necessarily antitrust-sensitive.

If the programs fail, the loss will be enormous for the foreign airlines, the traveling and shipping public and the agents, most of which are small businesses.

We believe that subjecting foreign carriers using these programs to antitrust lawsuits, after finding the programs to be valuable, is a threatening gesture by an official agency of the U.S. Government to foreign carriers and their governments. Since U.S. carriers benefit from counterpart IATA agency programs abroad, the United States must expect reprisals by foreign governments or their carriers if the CAB's failure to grant antitrust immunity leads to a serious disruption or breakdown of the IATA agency program in the United States.

Because each foreign carrier may serve only a few U.S. points under the terms of treaties exchanging traffic rights, the breakdown of the IATA agency program will severely harm each such carrier's ability to compete with larger U.S. carriers having substantial domestic markets and distribution systems in place in the United States. And we believe that this will constitute a denial of the fair and equal opportunity to compete provisions found in the traffic rights treaties.

Most foreign airlines depend on the numerous small agencies made possible by the IATA programs to fill their airplanes. For example, 80 percent of British Airways, sales are by agents, but 90 percent of such sales are made by very small producers, less than $38,000 per year. But these 90 percent account for 43 percent of British Airways' total revenue annually. In other words, nearly half our revenue comes from those small agents. And thus, destruction of the programs will go to the heart of British Airways', and similar foreign carriers', ability to maintain profitable services to and from the United States.

Because each IATA agent can represent equally all carriers upon accreditation, he can resist efforts by any single carrier to capture it or direct its sales effort in favor of such carrier. The IATA industry agent concept thus facilitates impartial information to consumers seeking to make informed choices and makes possible new market entry by new carriers, whether large or small, since they have no burden of establishing their own distribution systems. This greatly enhances competition and consumer choice.

And since there are no quotas on the number of agents which may be accredited, there is intense competition at the distribution level.

No consumer groups opposed the IATA agency program before the CAB. No such groups asked the CAB to begin its investigation. Nor in fact did the airlines. A very high percentage, over 80 percent of consumers, are satisfied with agency services. Carriers value this goodwill and are entitled to maintain their investment in it, earned over 40 years, by protecting his agreements from vexacious lawsuits.

The CAB's decision in the CMI, by exposing these valuable programs to ruthless antitrust lawsuits, stands to ruin an extremely important element of airline cooperation, which the CAB itself recognized was a great value to the public and to the continuation of a sound air transportation system.

Thank you, Madam Chairman, for inviting me to give evidence.

[The statement follows:]

STATEMENT OF JOHN D'A. MEREDITH, GENERAL MANAGER, THE AMERICAS, BRITISH AIRWAYS, ON BEHALF OF THE INTERNATIONAL AIR TRANSPORT ASSOCIATION

My name is John D'A. Meredith. I am General Manger, The Americas for British Airways and I am appearing here today on behalf of the International Air Transport Association, of which British Airways is an active member. The International Air Transport Association (known as "IATA") is a voluntary organization comprising over 120 of the world's scheduled air carriers representing most countries of the world.

In the decades since the end of the Second War, IATA has developed a series of airline agreements establishing standards for the appointment of passenger sales agents within the United States. Through a process of evolution responsive to the marketplace, these agreements and standards are now quite similar to those employed in the ATC program. By virtue of IATA appointments, over 20,000 U.S. agents are now authorized to sell international air transportation on most of the world's air carriers. The IATA program, therefore, largely complements the ATC program in the U.S. which is directed at domestic sales. I should, however, observe one important difference in the two programs. The IATA program is worldwide, and the total number of IATA agents worldwide now exceeds 35,000. Additionally, IATA administers agreements for the selection and retention of cargo agents in the U.S. and throughout the world.

Madam Chairman, it is especially timely that this Subcommittee is looking into the marketing of air transportation by agents in this country. While tourism and transportation are multi-billion dollar industries, we in the airline business never lose sight of the fact that it is the independent travel agent—most of whom are small businessmen in offices spread throughout the country—who provides us direct access to the consumer and, in turn, provides the consumer with direct and ready access to the integrated air transportation system. And by that. Madam Chairman, I refer not simply to the domestic air transportation system, but to the worldwide system of air routes which have developed so extensively in the decades since the Second War. We, in the international air transportation business, appreciate travel agents—in particular, the small agent—most of all. For it is these persons found in every city and village in every state who, by providing us one passenger here and two passengers there, are so vital to filling the large intercontinental aircraft whose efficiencies and comfort we all enjoy.

Recently, as you are aware, the Civil Aeronautics Board (CAB) has concluded a proceeding known as the Competitive Marketing Investigation or the CMI. The consequences of the Board's decision, which looked into the carrier agreements for appointing and retaining agents in this country, are yet to be fully felt. But, speaking for IATA and the international carriers, we have grave concerns that the Board's decision could shortly lead to the destruction of this most valuable and unique distribution system. Put very simply, if the IATA and ATC agency programs are as valuable to the public, the travel agents, and the carriers as the CAB itself found, then the CAB should have provided the antitrust immunity for these undertakings which Congress clearly intended it should do under the Federal Aviation Act. Instead, by denying that immunity and, I submit, the will of Congress, the Board has built a time bomb into the programs in the form of harassing antitrust lawsuits which I fear will destroy them in the end. This will be a great loss for consumers and carriers. Of equal importance, it will almost surely lead to the elimination from the marketplace of thousands of existing small travel agencies and to the inability of other qualified small entrepreneurs to enter the business.

I recognize, Madam Chairman, that the Board may not have intentionally undertaken to destroy or discard the IATA and ATC agency programs. But, as a practical matter, the Board's willingness to expose carriers continuing in these programs to antitrust suits by private plaintiffs, regardless of the merits of their contentions, points an arrow at the heart of the international carriers' United States marketing efforts. This is an ominous, threatening gesture which, I must say, has been viewed with both astonishment and disbelief by the international carriers, particularly the foreign carriers and their governments. Moreover, I find it quite incomprehensible that the Board would simultaneously expose the thousands of small agents who are collectively appointed by the world's carriers under these programs to the same form of harassing lawsuits. By denying antitrust immunity to the programs, which it otherwise found benefit the public, the Board has subjected the little agent to defending suits under the antitrust laws for which he has no adequate resources.

Madam Chairman, I would like now to discuss some of the factors that cause the international carriers to support the IATA agency program in this country as a vital component of the world air transportation system. I will address the airline marketing needs served by the agency program; its consequences for the fair and equal opportunity concept which is the keystone to international aviation relations between governments; its impact on competition, particularly as it affects the small agent; its role in promoting public service; the question of alternatives to the IATA program; and, I submit, the inherently non-restrictive nature of the program when compared to other ways of distributing air transportation tickets. I believe these considerations will demonstrate that the IATA and ATC agency agreements deserve to be maintained in this country as the backbone of the air transportation distribution system with antitrust immunity as, I submit, Congress intended.

I. INTERNATIONAL AIRLINE MARKETING DEPENDS ON THOUSANDS OF TRAVEL AGENTS WHO ARE AVAILABLE TO REPRESENT ALL AIRLINES REGARDLESS OF THEIR NATIONALITY, SIZE, OR ROUTE STRUCTURE

The IATA sales agency program satisfies the distribution needs of all participating airlines—large and small—by offering the optimal number and variety of sales outlets required to penetrate the vast United States market. Direct selling alone simply will not suffice. Even large U.S. airlines, with the support of high volume ticket sales on a variety of domestic and international routes, cannot economically cover the nation with their own sales offices. Foreign airlines can develop only a fraction of such sales volumes since they are precluded by law from competing for domestic traffic flows and as a rule are permitted to serve only a few U.S. gateway points on routes to their foreign homelands. There is not the remotest possibility that a foreign airline could achieve the volume of ticket sales that would be necessary to support a network of ticket offices sufficient to provide reasonable market coverage. For foreign airlines direct selling on a large scale is simply not an option.

I can demonstrate this point by referring to my own carrier, British Airways. We are certainly one of the largest foreign airlines in terms of U.S. sales volume. It is British Airways' policy to maintain its own ticket offices where they are cost effective, but not to do so at a loss simply to "show the flag". In pursuance of this policy British Airways currently maintains only some two dozen sales offices in the entire United States. It maintains street level offices to serve the general public only at on-line service points—such as Washington, D.C.—where there is a heavy demand for direct sales which can be combined with servicing activities for incoming passengers who need to adjust their travel arrangements. At a number of these locations we share space with another airline to make the sales office cost effective. Our sales offices at off-line locations (over half of the total) exist primarily to serve the needs of our agents in these areas.

Through the IATA sales agency program, which encourages the development of multi-business travel agents, we are now obtaining sales representation at over 20,000 locations thoughout the United States. I think it is accurate to say that as a result of this system there is no significant geographical or functional segment of the United States travel market lacking ready access to our services. Our experience is, of course, only representative of that of many other international carriers serving this country.

This is a superlative distribution network. I cannot imagine that there is any other sales system we could practically adopt that would provide us with the tremendous number and variety of outlets.

It is no exaggeration to say that the very existence of our airline—or many others—in this country in anything like its present form is dependent upon the agency sales representation we receive under the IATA program. About 80 percent of our passenger revenues in the U.S. are produced by IATA agents. This figure is comparable for all the international carriers, both U.S. and foreign.

The comprehensive scope of the IATA agency network in terms of sales locations is therefore vitally important to all IATA carriers, including British Airways. That is not to suggest that all those 20,000 agency locations authorized to sell British Airways transportation are doing so in anything like equal measure. Indeed, some of them may never have sold a British Airways ticket. A few of them, I am happy to say, top a million dollars annual sales for us. However, we are to a very substantial degree dependent upon the collective efforts of thousands of small IATA agents whose individual sales production for British Airways is not great and may only be occasional.

To illustrate this point, a few statistics will help. In our 81–82 fiscal year 90 percent of U.S. IATA agents produced less than $38,000 in annual sales for British Airways—the smallest active sales level that our records recognize. However, these thousands of small individual producers collectively accounted for 43 percent of British Airways' total passenger revenue. On some of our routes (e.g., Chicago-London) the proportion is much higher and it is clear that we could not serve the route at all without access to these numerous, small distribution outlets. On other routes the increment of revenue provided by our numerous small agents would spell the difference between operating fuel-efficient wide bodied aircraft or not, or providing an adequate frequency of service to meet the needs of the traveling public. Most certainly this revenue provides the margin of any profit we might earn on any of our routes.

It is perhaps appropriate here to reiterate a point I touched on earlier, which is that the very broad sales coverage of the IATA agency program upon which we depend draws strength from the joint sales agency program of the U.S. domestic carriers administered by the ATC. The two programs are designed to be complementary so as to permit the small travel agent to handle both the very broad range of U.S. domestic air travel and to write international tickets without much added effort. Under this relationship both domestic and international air transportation receive the widest possible sales representation thoughout the United States. Individual travel agents benefit for having a broad range of travel to sell and the public enjoys ready access to a tremendous array of travel offerings. The international carriers therefore have a compelling interest in the continued existence of the ATC sales agency network on a compatible basis with that of IATA.

II. THE IATA AGENCY PROGRAM, BY PROTECTING SMALL AGENTS FROM PRESSURE TACTICS, GUARANTEES EQUAL AIRLINE ACCESS TO ALL AGENTS AND THUS FULFILLS U.S. AVIATION COMMITMENTS TO FOREIGN GOVERNMENTS

The IATA agency program—comprised, as it is, of thousands of small agents—makes a major contribution to achievement of the fair and equal competitive opportunity objective that is central in most intergovernmental aviation agreements. It may seem strange to think of small businesses as having an important significance for foreign relations, but I can assure you that this is the case.

I have already noted that access to markets through the IATA agency system in this country is of great importance to carriers providing international services, particularly to the foreign airlines which do not have extensive networks of sales offices or routes or U.S. gateways through which to generate volumes of sales. For this reason the IATA agency program is invaluable to preserving a fair and equal opportunity to compete among all carriers—large or small—for international traffic. However, its implications for the fair and equal opportunity concept go much deeper than that.

The joint sales agency program of IATA embodies the critically important understanding among IATA carriers to permit each other to enjoy equal access to the commonly appointed sales agency network. Stated another way, the IATA carriers, by establishing the common agency program, have undertaken not to foreclose each other's access to agency sales outlets. This understanding is important to the competitive opportunities of all carriers, especially international carriers. It is perhaps even more important to the reciprocal competitive opportunities that U.S. airlines enjoy in most foreign countries where some national carriers may have extremely powerful market positions.

Under the IATA agency program, travel agents—and particularly the small businessmen—are not forced to choose between representing some airlines at the expense of not representing others. IATA agents—whether large or small—represent all of the airlines which have appointed them in a manner that is on the whole remarkably faithful to the tradition of serving the best interests of their clients, the American public. Without the restraining influence of the joint agency program one could foresee efforts by some carriers to appoint agents on the condition that they not represent competing carriers. In other words, to force agents—small businesses—into "take-it or leave-it" deals. Among the airlines, the losers in this country if that happened would clearly be the smaller carriers, including many foreign carriers. Even a large foreign carrier like British Airways would find the contest quite unequal if a substantial airline—e.g., with more markets to sell at a given point—pressed travel agents to represent it on a basis which excluded British Airways.

In the absence of the IATA agency program, it is not unlikely that some carriers will be tempted to exploit their market position in certain U.S. markets. In this process, the small agent may have little choice but to give in. By contract, the IATA agency program guarantees reciprocal access for all carriers to all agency outlets and makes it possible for small agents to resist being "bullied" by larger carriers.

The CAB's decision to deny antitrust immunity to the carriers' agents will, as I have stated, inevitably threaten the breakdown of the IATA agency system in this country and in other countries, at least insofar as U.S. carriers' access to agents in those countries is concerned. I find it difficult to imagine that the national carriers of foreign countries would continue to tolerate joint access by U.S. carriers to the IATA agents in their countries if, as a consequence of the Board's decision, reciprocal access is no longer guaranteed by the responsible authorities in the U.S. This would not be an act of political retaliation (although that possiblity would surely exist) as much as an act of commercial necessity whereby foreign carriers attempted to recoup in their home markets the contraction in revenues they would suffer here. Such developments would represent the very antithesis of U.S. competition policy, and since U.S. origin trafffic no longer predominates in many international routes, would be contrary to even the narrowest conception of U.S. mercantile interests. Ultimately, the consumers in all markets would suffer from diminution of the readily available competitive alternatives—i.e., free choice of flights, carriers and fares—that is the purpose of the fair and equal opportunity policy—and the IATA sales agency program—to promote.

I should add that the State Department was so concerned about the possibility of the CAB disrupting established international aviation relations and air services by its decision, that during the *CMI* it responded to foreign government complaints by moving the CAB to cease further review of the IATA agency programs in the national interest. The CAB rejected the State Department's motion virtually without comment, something I find quite incomprehensible.

III. THE IATA AGENCY PROGRAM PROMOTES COMPETITION

Since I am neither a lawyer nor an economist, I will not debate the competitive merits of the joint sales agency program either in terms of antitrust or market theories. But, Madam Chairman, I am an airline executive, I have attended the Harvard Business School, and I can tell you for a fact that the IATA agency program promotes competition in important ways that affect me and my business. If the Congress wants to promote effective competition—and I believe that it does—then it should support this program by removing the time bomb inherent in the CAB's decision to deny antitrust immunity.

It is a fact that the 20,000 IATA sales agency locations are enabling international air transportation to compete successfully against a panoply of tempting alternatives ranging from camping in your fabulous U.S. national park system to the purchase of vacation homes, boats and video tape machines. Our industry has enjoyed a sustained growth rate well above the average in the U.S. economy, especially in the pleasure travel area where we compete head-on for discretionary consumer dollars. The comprehensive agency network created by joint industry appointment has served well to maximize the competitive presence of our industry and each carrier throughout the nation.

The IATA agency program also promotes competition between and among air carriers. The multiple-appointment system coupled with a strong tradition of professional impartiality among U.S. travel agents serves well to bring worthy competitive offerings to the attention of consumers. In particular, this has promoted effective competition by new carrier entrants lacking established market identification.

I personally observed the pro-competitive benefits of the IATA agency system at work when we inaugurated service on British Airways' Seattle-London route. We had never before provided service at Seattle on any route and, to say the least, were somewhat concerned as a new carrier taking on an established competitor, about our lack of strong identity in that market. I can assure that our task was and is being made vastly easier by the fact that we had an established sales agency network in place in the Pacific Northwest region. The agents there were professionally familiar with our airline and started out with a thorough knowledge of the forms and procedures to be followed in representing us. It was therefore a manageable task to acquaint them with the schedule, fares and other details of our new service offering. While we are, of course, engaged in general public advertising, we must rely primarily upon the IATA agents—the many small businesses—to bring the competitive merits of our new service to the attention of consumers who are seriously in the market for international air transportation. This is a process we have gone through, successfully, in many other markets and we have every confidence of success in Seattle.

But the joint agency network promotes effective competition by all airlines, not just new entrants. The range and complexity of our fare and service offerings in this industry taxes even the most experienced professionals, let alone the average consumer. Our most significant competitive pricing initiatives are wrapped up in jargon like APEX, Super Apex, GIT, Super Saver, Supreme Super Saver, and Vacances, which is paraded before the American public in a jumble of TV and radio ads which mention "some restrictions" with a caveat to "see your travel agent for details". There are dozens of competitive service variations that have significance for at least some travelers, such as three-class service, sleeper seats, lounges, inflight movies, and special terminal facilities, to name a few. These are not widely known among the general public any more than our fare offerings are always understood.

Without a network of professional travel agents to explain personally to individual consumers on a fair comparative basis the price and service options that have relevance to their particular circumstances, airlines risk failure of many of their best competitive initiatives for simple lack of consumer awareness and understanding of them. We would be somewhat like the American food packager who perfected a new technique for packaging frozen croissants without spoiling their delicate texture or flavor. Test marketing revealed that the average American consumer found the new product to be delicious when tasted but did not know what croissants were when seeing the package in a grocer's freezer. According to a press report, this lack of consumer recognition caused the demise of an obviously superior product.

The IATA agency program as it now exists in the United States also promotes a degree of competition at the travel agency level itself that would disappear without the program. Under the IATA program the air transportation industry is almost entirely free of the most common restriction in other market distribution systems: the demands of retail sellers for exclusive sales territories or for quotas on the number of sellers. Entry into the travel agency field as an IATA accredited agent is available to all who satisfy a few, straightforward standards. There are no quotas or limits on the number of IATA agents who can be appointed. Most applicants are accepted and very few ever fail in business because the standards make sure they are qualified. And each agent—no matter how small—has the opportunity to sell transportation over the lines of carriers from all over the world.

In the absence of the joint IATA program, large, established agents would be free to bargain with airlines for exclusive appointments in various areas. Thus, for example, the largest and most influential travel agent in a particular town might demand to be the exclusive British Airways agent in that town as a condition of representing British Airways at all. Notwithstanding the many very small agency locations, there are agents who are important enough in particular markets to demand and get the kind of consideration which restricts the airlines' distribution network and the choices available to consumers. The IATA program prevents this activity which would be most harmful to consumers and to the smaller agents.

IV. THROUGH THE IATA/ATC AGENCY PROGRAMS, EACH TRAVEL AGENCY MAKES AN IMPORTANT PUBLIC SERVICE CONTRIBUTION

The IATA/ATC agency programs make important contributions to the ability of the air transportation system to serve public needs.

In the first place, these programs provide the only known framework for the joint designation of sales agents airlines involved in providing interline air transportation. That is certainly a major public need if British Airways' experience is a guide. About 40 percent of our total passenger traffic involves through transportation on two or more airlines. At least 60 percent involves some form of interline transaction with another carrier requiring our recognition and acceptance of a standard travel document issued by an IATA agent.

The IATA/ATC agency programs also provide reasonable assurance—indeed the only real assurance the public has—that persons calling themselves travel agents to whom consumers are entrusting their money and their travel plans are in fact financially and professionally qualified to act in that capacity. I sumbit that on this ground alone there is a compelling public interest in maintaining these programs, and I believe it is significant that in the *CMI,* not a single consumer group opposed in any way these agency programs. The very high level of consumer satisfaction with IATA/ATC agents is also a matter of record in that case.

The growth and development of the air transportation business depends to a large extent upon a continued high level of public confidence in the reliability and integrity of travel agents. British Airways is, of course, greatly concerned that the agents accredited to represent it are publicly regarded as experienced and capable of giving high quality service. However, British Airways also has a direct business interest in the quality of the travel agents representing all airlines, including its competitors. Anyone familiar with the history of charter air transportation in the United States is aware how the reputation of an entire industry can be tarnished, and its sales revenues depressed, by the irresponsible or dishonest actions of a relative few.

In this context, Madam Chairman, I would note that the CAB has always been constrained to protect by regulation consumers' interests—and money—in transactions involving promoters of charter flights. Even today, in this era of deregulation, the CAB finds it necessasry to devote substantial resources—that is, public money—to enforcement in this area. Indeed, the CAB recently abandoned plans to loosen its comprehensive charter consumer protection rates. Yet, the CAB has not felt the need to protect by regulation [and enforcement through taxpayers' dollars] consumers' dealings with ATC and IATA travel agents for the basic reason that the conference agency programs have worked effectively to protect consumer interests. If these programs failed, because of the CAB's CMI decision, one must ask who will effectively guard the consumer and how much will this cost in terms of public resources?

The IATA/ATC agency programs also provide the basis for developing standard industry-wide forms and procedures for such things as reporting and remitting by agents. Apart from fostering interline transactions, this promotes efficiency in the air transportation industry, avoiding the sheer economic waste of procedures that are duplicative as well as incompatible with the complex tasks involved.

V. THE IATA AGENCY PROGRAM, DEDICATED TO MAINTAINING EASY ENTRY INTO THE AGENCY BUSINESS, HAS CREATED A UNIQUE, RELIABLE AND COMPETITIVE DISTRIBUTION SYSTEM FOR WHICH THERE IS NO COMPARABLE SUBSTITUTE

It is significant that the CAB, in its *CMI* decision, did not identify any alternative to the IATA/ATC agency programs. Instead, as I have said, they simply have sidestepped this whole issue. I suggest that the reason for this is pretty clear—the IATA/ATC programs are totally unique, as are all the benefits these programs provide.

The IATA/ATC joint agency system is simply the most economical and effective way to accomplish the widespread sale of fairly expensive, rather complex service contracts for transportation (i.e., airline tickets), along and in conjunction with other travel related services. I should note that the hotels, rental car companies, steamships, buses, and so forth also rely on the competence and public acceptability of our IATA/ATC agents.

If the IATA agency program fails because of the Board's decision in the *CMI,* it seems quite clear that most airlines, including British Airways, would not have any realistic alternative of going it alone. British Airways could not afford on the strength of its own limited volume of U.S. ticket sales to administer an agency program encompassing anything like IATA's 20,000 agency locations, most of which are producing very little revenue for it on an individual basis. Yet, as I have demonstrated, British Airways requires representatives by a very large number of agents in diverse locations to sustain its U.S. operations. Thus, we would be forced to try to find some entity that could be substituted for IATA in the role of administering a large sales agency network.

There is no organization that could readily undertake IATA's agency administration function. As a consequence, major U.S. airlines would be likely candidates to assemble agency networks which they would use themselves and, as general agents, provide to foreign airlines. I see nothing to recommend such arrangements over the present IATA/ATC system from the standpoint of the public, the airlines or the agents. Lacking the extremely broad base of collective appointments that the present system has, such Balkanized agency networks could never hope to equal the comprehensive sales and coverage now provided to the airlines and the public. Nor could they provide the small business agents with as wide an inventory of air transportation offerings as at present. They would impair if not destroy interline opportunities for most American travelers. And they would lack the commercial neutrality that characterizes the IATA/ATC agency administrations.

It has sometimes been suggested that the U.S. Government could provide a substitute for some of the important IATA/ATC agency administration functions through a program of travel agency licensing. However, there is no purpose in debating here the merits of Government licensing of agents versus the present conference appointment system since there is not the slightest indication that a comprehensive Government licensing scheme will be adopted.

VI. CONCLUSION

I have described the IATA agency program as the heart of the international carriers' U.S. marketing effort. However, I would like to conclude this statement with the observation that it is not a restrictive program from the standpoint of airline marketing. It does not preclude direct selling by participating airlines. British Airways, for example, engages in direct selling wherever that is commercially advantageous. In addition to maintaining public ticket offices in major cities, we have sales representatives who deal directly with various commercial and group travel accounts.

And the IATA program most certainly is not a barrier to experimentation with novel distribution techniques. For example, before the *CMI* even began, British Airways approached Ticketron as a possibly efficient way to distribute its point-to-point standby tickets. It happens that we judged Tickertron's computer system to be incompatible with our needs. Our IATA membership has never been thought to prohibit us from exploring such distribution options. I find quite remarkable that the CAB, in its zeal to characterize the agency program as unduly restrictive, summarily dismissed this factual evidence—apparently because it totally contradicted the Board's preconceived view of how the programs operate.

Thank you, Madam Chairman.

Senator **Kassebaum**. Thank you very much. I think we have heard some interesting comments on both sides of this. There are times that I wonder who really is for the change. I also find it hard to believe that if we had it the way it was, or S. 746, it would particularly help with the Continental chaos. I think that really is something that is apart from the particular issue at hand, other than just the sense of trying to assist in any way we can the stability of the system.

I would like to explore just for a moment the exclusivity because we have seen now the repeal of exclusivity that has been in effect almost 1 year, several months short. I would like to ask anyone to respond if you believe there have been any ill effects from that decision.

Mr. **McKinnon**. I will defer to the travel agents on this, Madam Chairman, because in the Government we don't see any.

Mr. **Ruden**. Madam Chairman, my name is Paul Ruden. I am counsel to ASTA.

To our knowledge there have been no decisions by any conference carriers to appoint nonaccredited agents thus far, and therefore in that sense there has been no ill effect.

On the other hand, the Board's decision does not fully go into effect until 1985. I think the airlines will tell you today, as they have said in the House and other places, that they do not want to lose the benefits of the program and they perceive they will lose them through the Board's decision. So they are not likely to rush to implement this so-called freedom that the Board has given them.

Finally I think that there is operating here the idea that no one is entirely confident that the Board's decision is indeed going to be the final decision in this matter. It is the hope of the industry that the Congress will intervene by the passage of these bills.

So in the short time that has passed since the decision, no, there has been no major disruption by virtue of that particular provision. However, there are resolutions pending before the Board which were adopted by, at this moment, ATC, to try to cope with the Board's decision, to keep the conference functioning during this 2-year period. Those haven't been acted on yet.

When they are, and we know the final outlines of the Board's decision, we may then see the carriers beginning to move because as we get closer to 1985, the idea will become current in each airline's mind that they do not want to be last. Somebody will do it.

Senator KASSEBAUM. I think your comment that the carriers haven't wanted to lose the benefits of the program is one that I have to understand. I guess I would have to ask, what will everybody rush to? Because it has worked well doesn't mean necessarily that it seems to me everybody is going to rush to something else.

Following along, because in Judge Yoder's decision he specified that there was the possibility of using a noncertified agent, and I think there has been some question of what that might mean. Again, I would like to ask whether you think this would specifically allow say a grocery store or a supermarket of some sort to sell an agreeing airline's ticket at the counter. I mean, is this something you would envision from the administrative law judge's comment regarding that?

Mr. REIN. Madam Chairman, we have studied that decision very carefully. I think that it is quite clear that under the Board's decision, if an airline wanted a grocery store or a garage mechanic to sell tickets, they could appoint one to do so because in the absence of any agreements amongst the airlines limiting their right to appoint, virtually anybody could be handed a stock of tickets and told you're our agent, and those tickets would then be unleashed within the system.

Other airlines would then decide whether to accept those tickets or not as they saw fit, and that is the essence of the Board's decision. So as the Board would have it, yes, any grocery store could sell tickets.

Mr. McKINNON. I don't know how free-wheeling of a discussion you want to have, Madam Chairman.

Senator KASSEBAUM. Well, that is the purpose of this.

Mr. REIN. I would like to ask the chairman whether he sees under the Board's decision any barrier to a carrier deciding to have a grocery store sell its tickets. In fact, that is what he wants to have.

Mr. McKINNON. No, what we want to do, is to give an airline the freedom to have whoever they want to sell their tickets.

Now let's look at the realities of life. There is no shoeshine stand or lemonade stand that that is going to sell an airline ticket. No air carrier is going to turn over ticket stock to anybody unless the airline is guaranteed positively that they are going to get their money back from the people they allow to sell their tickets. That means they are not going to have it in every little hamburger house around the country.

They are only going to do business with somebody who is going to absolutely guarantee to them they are going to get their money back because that ticket has a value and they have to provide the transportation.

Mr. REIN. Madam Chairman, I just think there is a difference between prediction of what is going to happen and legal effect.

Mr. McKINNON. That is reality.

Mr. REIN. The Chairman is saying on the one hand, the Board would allow hamburger stands and shoeshine parlors to do it if an airline so desired. He is predicting that nobody is going to do that.

The essence of deregulation is that the Government ought to get out of predicting and let the carriers do what they want. What the carriers have done here is they have formed a voluntary system for distribution which they believe has great benefits. Carriers look out and say here is a system which we think is good. Mr. McKinnon and his colleagues think it is bad. As he says, it is a lousy deal and he doesn't think people ought to do it. That is not his job. That is not what the Congress told him to do under deregulation.

We have a voluntary agreement. We think that the establishment of reasonable standards for selling those tickets protects the airline's interests in consumer confidence. We want people to come to travel agents and give them money in return for a piece of paper. They are only going to do that if they believe that that paper is going to be honored.

Now if an airline makes a decision and it is a bad decision, Mr. Chairman, and you cannot predict when somebody will make a bad one, then people who need the cash flow will make very bad decisions in extreme circumstances.

Mr. McKINNON. I will tell you what. We will let them do whatever they want without antitrust immunity and let's see how that works.

Mr. REIN. Without antitrust immunity is a way of saying the Government is going to stop you from doing it with its right hand while pretending to let you do it with its left hand. And that is how it is viewed around the world. I don't think we should confuse this debate.

The withdrawal of antitrust immunity unleashes the police power of the Government to stop the voluntary agreement from functioning as the carriers want it to function. That is how every foreign government sees it. They see it as a restriction upon voluntary activity by the airlines, not as deregulation.

Mr. McKINNON. Every foreign government doesn't have antitrust immunity. They don't need antitrust immunity. We operate in a free enterprise environment, and we don't have the Government protecting business like virtually every other country. That is what British Airways was talking about.

Most countries are not familiar with the free enterprise system like the United States. They have government protection for everything they do. They have monopolies. And what we are talking about in the United States is freedom to go out and compete.

Mr. **Willis**. Madam Chairman, I understood you to ask a different question, which was what about Yoder's decision? As I understood your question, could, under Judge Yoder's decision, a grocery store become a Ticketron-type outlet.

Senator **Kassebaum**. Right.

Mr. **Willis**. Your question touches on one of the concerns that we have at the Department of Transportation about the legislation as it is proposed, where it simply mandates in law Yoder's decision, because we are absolutely confused by what he meant.

Senator **Kassebaum**. By a nonagent retailer.

Mr. **Willis**. Yoder, in a footnote, talks a little bit about what an agent is. He doesn't exactly know what it is, and states that ticketron isn't a precedent. We have not been able to figure out what he was getting at there, how he distinguished what he would permit, which was he would disallow marketing exclusivity but he would allow agency exclusivity.

We have not been able to define or have any confidence in what the marketing nonexclusivity would mean for these other types of entities which might be in a position to market. That would be, if you were to pursue this legislation, an area which we think would absolutely have to have clarification if there were to be any reasonable guidance.

Senator **Kassebaum**. Mr. Meredith?

Mr. **Meredith**. Madam Chairman, I have heard the Chairman of the CAB on several occasions say he wants the airlines to have the freedom to do these things. The significant fact is none of the airlines have asked for this freedom. It is something we are having foisted upon us, and I am always suspicious of people who try to foist freedom on somebody else.

I suspect that isn't freedom. That actually is regulation. And I would suspect that is not what we want and we haven't asked for it. Why are we always being told we have to have something?

Mr. **McKinnon**. I would submit to you that the airlines are too intimidated by the power of the travel agents to ask for that freedom or any other freedom for fear of retaliation. The first one that gets out of line is going to be boycotted by the travel agents.

Senator **Kassebaum**. Maybe the carriers would like to offer a comment.

Mr. **McKinnon**. I don't see any of them here.

Senator **Kassebaum**. I guess Mr. Phillips would be speaking for them.

Mr. **Phillips**. Madam Chairman, I am with the Air Transport Association, the trade association of U.S. airlines. We have taken a position on this legislation and on the case as an airline industry, and I speak for the airline industry with respect to two comments.

One is the power of the travel agent over the airlines, and second, the exclusivity. I think the power of the travel agents over the airlines requires analysis before conclusions can be drawn about it.

No. 1, people should recognize that the average wage cost of the reservations and ticketing agent in the airline industry is about $30,000 including fringes. The average wage of the travel agent employee is somewhere between $10,000 and $15,000, depending on what part of the country they are from.

One of the major reasons that the airlines have relied so heavily on the travel agency industry and have gone more and more to the travel agent industry is that they are able to provide this reservation and ticketing service at cheaper cost than they can provide from having their own employees do it. That is fact No. 1.

Fact No. 2 with respect to their powers, the largest single travel agent office in the country sells $50 million worth of sales a year. The total travel agency sales this year will be about $24 billion. The largest single entity, travel agent entity, has sales somewhat less than $500 million. That is about 2 percent, less than 2 percent, of total sales.

I can't understand how a single entity or single office with that small a percentage of airline sales can exert that kind of power over the airlines. The fact that when airlines move to take some action on commissions it doesn't take hold in the marketplace, is not because the travel agents exert power over them. It is because their competitors don't match them and therefore there will be a disparity in rates and service.

And that is what happens in the marketplace. It is not coercive power. It is a fact of the deregulated environment. And to say that is coercion is just ignoring the analysis of what really happens in the marketplace.

With respect to exclusivity, I think the issue is irrelevant. It is kind of a red herring. What we have developed here and what are here asking to preserve is a series of standards for the appointment of travel agents which the public will recognize as industry agents, which the airlines have some confidence that these people are qualified, that they can meet the financial requirements and that therefore when a customer shows up with a ticket sold by a travel agent, the airline knows he can honor it.

That is exclusivity, and every industry that has a professional means of distribution that requires qualifications has the protection of the antitrust laws or its equivalent in some other governmental form, and we need it in this environment as well.

Senator **Kassebaum**. Senator Goldwater has some questions.

Senator **Goldwater**. Am I correct in thinking that 10 percent of the ticket sales are retained by the agency?

Mr. **Phillips**. In sales through the area settlement plan, which is the collective settlement mechanism for the airline industry. Currently commissions are running about 9.9 percent of sales or 10 percent.

Senator **Goldwater**. Could you tell me what percentage of that figure is of the total costs of running an airline?

Mr. **Phillips**. It really depends on the airline's profitability, Senator. The airline industry, over the last several years as a whole has been operating in a loss situation, so it is probably slightly more than 10 percent.

Senator **Goldwater**. It's a percentage of the figure?

Mr. **Phillips**. Correct. It's about 10 or 11 percent right now.

Senator **Goldwater**. What the airlines are paying the agencies amounts to about 10 percent of the total cost of running an airline?

Mr. **Phillips**. No, 10 percent of the sales through agents, and agents right now sell about 60 or 65 percent of the total airline sales. So travel agent commissions per se probably then are something more like 6 or 7 percent of total airline costs.

Senator **Goldwater**. That isn't what I am trying to get at. I am trying to get at what does this represent to the—say American Airlines or TransWorld or any of them, what does it cost them percentagewise to pay these agents?

Mr. **Phillips**. Well, it costs them 10 percent on every dollar.

Senator **Goldwater**. I am talking about the cost of doing business.

Mr. **McKinnon**. About 6.4 percent, Senator. It is the fourth largest category of airline expenses.

Senator **Goldwater**. The fourth largest. But you don't know what the percentage is?

Mr. **McKinnon**. The percentage is roughly 6.4 percent of the total operating expense of an airline. No. 1 is labor; No. 2 is fuel; then you have maintenance and then you have travel agent commissions.

Senator **Goldwater**. Another question note related to that that I have is without these agents, how are you going to handle a customer, say in Ashfork, Ariz., who is about 150 miles from the nearest airline?

Mr. **McKinnon**. Senator, nobody is talking about doing away with the agents. That is the problem with this. The agents even testified before the Civil Aeronautics Board that this decision of ours would only affect about 2 percent of their sales.

Nobody is talking about doing away with travel agents—all we are talking about is allowing the opportunity, with the new electronics and computers coming along, and as other new ideas come along, for airlines to be allowed to enter the marketplace. Nobody is talking about doing away with travel agents or putting them out of business or any of that.

We are just talking about opening it up. If somebody else wants to compete in a different way, not having to sell like a travel agent does and meet the same criteria, but having some new technique of selling a ticket, why shouldn't they be allowed to enter the marketplace? That is what this case is all about.

Mr. **Willis**. If I could add to that, Senator, it is our view at the Department of Transportation that the air travel agent system is a monumental system that has functioned effectively. It performs a genuine service to the public. The 6-percent cost is a cost that is earned. These people do a job. And in a deregulated environment, their role, in our view, expands even more because there are more service opportunities; there are different rates and fares. And those that perform a valued service to the public are earning their way by clearing up some of the confusion of deregulation.

We think they are here to stay and they will grow and they will still be in Flagstaff and elsewhere.

Mr. **Meredith**. Madam Chairman, the idea that somehow the agency program stops you from doing things that are innovative is absolute nonsense. I don't know where on Earth this idea comes from.

We looked at Ticketron as a means of helping to sell our standby tickets. We decided they couldn't do it very well, and I notice that World Airways the other day said the same thing in public. But we didn't feel inhibited in doing it.

I gave that evidence to the CAB. They totally ignored it. I think it was inconvenient for the record. They just totally ignored it.

And the other idea that if an airline wants to get his commission costs down, the CAB decision is the only way you can do so, and I quote from Chairman McKinnon's statement this morning, is just not true. We reduced our commission payments to agents last year in the United States and we had one of our best years ever.

So the statement is not correct, and for the record, I have to say that it just doesn't represent the facts. I don't feel intimidated by travel agents. They are the means by which we earn an awful lot of money in the United States. It is not a case of intimidation.

Mr. **McKinnon**. But why shouldn't the marketplace make the decisions rather than the Government? We have enough Government, and the idea is to get the Government out, except where it is absolutely necessary, and it is not necessary in this particular instance.

Mr. **Meredith**. The marketplace does make the decision. We fix our commission rates, not the Chairman of the CAB, as he well knows.

Senator **Kassebaum**. I think that we have found in this argument of regulation versus deregulation that we have to be careful not to throw the baby out with the bathwater. That is indeed the purpose of this hearing.

Do you have any more questions?

Senator **Goldwater**. Just a comment. When we deregulated the airlines, frankly it was a shock to me to find how few airlines ever knew anything about running a business. They had been protected by the Government all their lives and I don't think there is a person in America that has flown longer than I have on airlines, starting back in 1927.

Now it is in a competitive market, such as most of us who have been in business have had to live with, and they can't hack it. And I don't think a little cost like 6 percent, if you eliminated it altogether, is going to make the difference between airlines making money or not.

They are just not running their lines like a business. They need new equipment. They don't have the money. I can go to Phoenix, Ariz. for about eight or nine different fares.

I think, Mr. McKinnon, you ought to have classes for the airline presidents. No, I mean it. Tell them that they can't give their money away in high labor rates, that they have to, like that ad says, they work for it.

Mr. **McKinnon**. I agree with you, Senator, although what has happened in the last couple of years is that airline management has changed. It had been inefficient under regulation and either the management is learning how to compete today or they have changed management to competitive-type people who are running the airlines.

The interesting thing is that of the three troubled carriers—Braniff, Continental, and Eastern—none of those presidents has expressed any desire to me to return to regulation. They would prefer to live or die based on the free marketplace.

Senator **Goldwater**. My guess is that in 5 years we will only have about two airlines left.

Senator **Kassebaum**. That is a dire prediction.

Mr. **Meredith**. Madam Chairman, I think there is a problem here. We are tending to debate deregulation. What we are actually talking about is whether the CAB's action in the CMI case was sensible. Whether deregulation is sensible is in my view a separate matter. Some parts of deregulation seem to be sensible; some seem to be pretty average folly. There are pluses and minuses in that case.

But the case today we are talking about is whether the particular decision that the Board made in this case is sensible. In our view it isn't.

Mr. **Rein**. Madam Chairman, you raised a specific question about Judge Yoder's decision and what the marketing exclusivity meant, and I know Frank commented on it and it might be useful to say a word from IATA's perspective about what it did mean, what Judge Yoder had in mind.

When you look at the means of distributing airline tickets today, there are fundamentally three concepts at work in the market.

First of all, airlines distribute through agents. That agent represents the airline, is its legal representative. When an agent issues you a ticket, it is the same thing as when an airline does it and the airlines stand behind those tickets. They stand behind the representations of the agents.

Second, there is direct distribution by the airlines. The airline can sell you from its own ticket office, and it can deal with you over the phone and deal with you in a variety of ways. An airline can deal with you through a cable television system, through a machine that you see at the airport or in a bank location or anywhere else. An airline's distribution directly is nowhere affected by these agreements. Airlines do that individually any way they want to do it—electronically, mechanically, through the post office, in any kind of way.

There is a third system of distribution which you might more conventionally associate with retailing. That is the situation where the middleman actually becomes a possessor and reseller of the goods. For example, if you buy a charter trip, that aircraft capacity has first been bought by the charter operator and he turns around and he resells it to you, very much the way a conventional retail business operates.

That kind of retailing, which under the law is known as indirect air carriage, is also a system which is in no way affected by the agency agreements. They don't have anything to do with indirect air carriers.

Now Judge Yoder looked at the evidence and he saw these three kinds of ways to do it. There are obviously shades and gradations between them. If an airline distributes on its own behalf, it may not do that entirely with its own resources. It can, for example, lease space for its downtown office. Somebody is making a profit on that. It can use messenger services to deliver the tickets. It uses advertising agencies to promote the tickets. It can use people to physically distribute the tickets or the priorities on reservations.

All those are functions not affected by the programs, they fall within the general category of marketing. And I think what Judge Yoder was saying is that the airlines ought to keep the agency standards within their bounds. That is, they ought to apply to people who hold themselves out as agents, but they ought not to constrain people who don't want to be agents who want to assist airlines in new marketing or to sell under their own name.

Now there was a lot of debate and evidence about the cargo market, which also has an agency program. Now in that cargo market there are a lot of air freight forwarders, a term that you have probably heard. Those people are resellers. They are conventional retailers. They sell in their own name. They are not affected by the agency program. They enter and leave the market freely. They can do anything they want. They can innovate in any way they want and the airlines individually decide whether to work with a forwarder or not. That exists side by side with the agency program.

The judge looked out and he said gee, why is that true in cargo, and the Board itself said there is all kinds of competition in cargo—why is it not true in passenger? And I think the judge realized that the reason it is not true is because, under the law, there is no authority for people to do in passenger sales what they can do in cargo sales—that is, sell in their own names, become retailers and freely sell tickets.

Now what the Board's decision says is that if an airline wants to appoint virtually anybody as its agent and take the responsibility on itself, it can do so. But the Board has not yet said that if anybody wants to come in, buy the tickets and resell it, he is free to do so, because that is an indirect air carrier, and they don't hand out licenses of that kind.

So what they are asking the airlines to do is accept risks that they are unwilling to take, because when the evidence was taken, when the judge looked at the evidence, he said there is all kinds of room for innovation in direct selling; there is all kinds of room for innovation in true retail selling.

And that is what he was trying to preserve. He was saying let the agency sector continue under the voluntary agreement so that we have a high standard for agents, a reasonable standard, a credible standard to the public and the airlines. Let the innovations come from people who want to come in and sell in their own names and convince the public and the airlines that they are trustworthy. Let the innovations come through direct marketing where airlines are free to do as they choose.

That is the line the judge was drawing. He was trying to maintain the stability of the agreements while opening the way for all kinds of innovations, and he saw the real evidence of that in the cargo market where the regulatory controls had been lifted. And that is the line he was drawing.

Senator KASSEBAUM. I would like to move on, to get into interlining and some of the other aspects of this, but Senator Exon has to leave in just a minute. Do you have a couple of questions?

Senator EXON. Yes, thank you, Madam Chairman.

Since we are talking about service to the public and also money here, can the panel tell me, what is the "going rate" on commissions? What is the high and what is the low and what is the average? Is that a question that any one of you can enlighten me on?

Mr. SANTANA. The average is approximately 10 percent, 9.9. I guess the low would be 3 at an inplant. The high might be 15 but I doubt if it gets that high on a normal basis.

Senator EXON. Is that generally agreed to by all sides represented here?

Mr. McKinnon, let me ask you a question. Why do you believe that business travel departments should qualify for commissions when they are primarily purchasers of airline transportation? In other words, it seems to me that they are not providing much of a service. They are just saving some money. What is your rationale in supporting that position?

Mr. McKINNON. Well, that is a minor part of this decision, Senator. The business travel departments have qualified for discounts. Up to this point the airlines really haven't given them to them. The commission is another form of a discount. It is another way of BTD's cutting their costs.

The airlines still have to recognize and honor that if they want that to happen. So it is up to the airlines to have the freedom to do that. I think it is a relatively minor part of the decision, although to the business travel departments, of course, it is very important. However, the agencies see it as a threat.

The real issue in this whole case, and that is a part of it, is do you allow other people with creative ideas to have the opportunity to enter the sale of airline tickets. To do that you had to allow the business travel departments to have a commission.

You know, just as an aside on that, when Mr. Meredith mentioned that he didn't want to discuss deregulation, I sort of had to smile at that because what is good for the goose is not good for the gander in his opinion. Deregulation has allowed travel agents to go from sales of around 42 percent up to about 65 percent of the tickets sold domestically in the United States.

So it has been a great boon to the travel agents. It may not be something he wants to discuss from the airline's viewpoint, but for travel agents it has been one of the biggests shots in the arm. That is why commissions rose 11 percent this last year.

Mr. MEREDITH. Madam Chairman, for the record, I didn't say I didn't want to discuss deregulation. I said that is not the subject we were discussing here today. And I think this is one of the problems in these debates. You can take the subject and just twist it around to make a point. That is not what I said.

I am happy to debate deregulation, although deregulation domestically is not my concern. I don't think as a foreign carrier I should debate it here. That is for those concerned within the States. Internationally, deregulation in its pure form doesn't exist. The United States or any other government cannot foist on the international community something which isn't agreed on both sides. So deregulation in its pure form doesn't exist internationally.

Mr. Ruden. Senator Exon, I wouldn't want this record to be left with the statement uncontested that this BTD issue is a minor problem. BTD's are, as you suggested, customers of the airlines. They are part and parcel of the purchaser of air transportation. They are not agents engaged in the business of selling to the public, and indeed their representatives testified repeatedly that they did not wish to be in that position.

The problem, one of the problems, presented by the BTD's in their demand for access to these programs so that they could then call themselves agents and claim commissions, is how do you run a conference program that was conceived, designed, and has evolved for 40 years to deal with accredited selling agents to the public when, in that very process of administration and decisionmaking, you also have sitting around the table in an antitrust-exposed atmosphere under the Board's decision, the customers of the airlines?

So the admission of the business travel departments to these programs, I suggest, would be in and of itself destructive of the ability of the airlines to continue the programs.

Senator Exon. Let me respond for a moment so that we can control this up here a little bit. It seems to me that we talk about protecting the public and giving the public the best possible deal. We are all for that. But it seems to me that if you are going to allow a business or a corporation to set up and get a discount, and that is what it amounts to, what about Mr. and Mrs. John Q. Public? If they gain enough expertise to read a schedule, should we then also give them the 10-percent discount? Where do you draw the line?

Mr. McKinnon. There are a variety of discount fares available if you are wise enough to be able to shop around and figure them out.

Senator Exon. Now wait a minute. You know that the discount, the 10-percent commission is on top of whatever the fare is. I don't think that is the right answer. Do you think it is?

Mr. McKinnon. That is true on the bulk of the airlines, yes, what you are saying. BTD's account for about $600 million in sales out of $24 billion. So when I say it is a relatively small part, I think the record indicates that it is.

Senator Exon. Each Senator and his staff do a considerable amount of traveling. Would you think that if General Motors can have their discount arrangement with the airlines, would it be fair for Senator Exon to set up somebody in his staff that could get the 10-percent discount so that we could save the taxpayers that much money, as we travel about at their expense?

Mr. McKinnon. Well, the travel agent industry doesn't think that would be so good. You wouldn't qualify under the rules they have to operate as a travel agent.

Now what is the difference between a commission and a discount? Currently, BTD's have the opportunity to get a discount from the airlines. Now under this they could have the opportunity to get a commission. Either way, it is a cut in their cost of a ticket.

Under the old system, discounts were available if the airline would discount the tickets to them. They generally did not. But it was available.

Senator EXON. Madam Chairman, I want to ask one question on behalf of Senator Inouye, who could not be here this morning, and I will read his question. I guess it would be directed at the CAB officials. This is Senator Inouye.

The Board's decision was split, three members concurring in the opinion, one member concurring in part and dissenting in part and one member dissenting. Does that mean that the Board is far from certain that the present system needs such drastic fixing? I ask this because the Board has said that it felt compelled to do this by the mandate for competition in the Airline Deregulation Act. And there is a growing body of evidence that the act may not have been in the best interest of our airline transportation system.

How does the Board feel about this and the split that I just outlined in Senator Inouye's question, was that the split and does that remain the split on the CAB?

Mr. MCKINNON. Well sir, that was the split at the time. The vote was 4 to 1 to end exclusivity. It was 3 to 2 to end antitrust immunity. I was the member that partly concurred and partly dissented.

Since the time that I cast my vote, I have urged the industry to come to the CAB and show us any evidence or real logic and reasons why antitrust immunity ought to be retained. I still keep an open mind but quite frankly, as I have gone through these hearings and further studied this subject, I have found more and more that there is less and less reason to maintain antitrust immunity.

Now whether a unanimous decision means it is a mandate of the Board or not, I submit to you as part of a legislative body, it is rare when you have 100 Senators voting for anything at one time. And that is sometimes true at the CAB, we don't have a unanimous decision.

Whether that is the decision of the Board today is unknown. Since this vote was cast there are two new members of the Civil Aeronautics Board and two of the old people have left. We haven't had a recent vote on it.

Senator EXON. What is your opinion, what is your best judgment as to if you had a vote today?

Mr. MCKINNON. The vote would be the same.

Senator EXON. Mr. Willis, do you care to comment on it?

Mr. WILLIS. If I could supplement those comments, the position of the Department of Transportation in the proceeding before the Board was that, with respect to the accreditation rules that would be permissible—that is, the permissible standards for a travel agency system—antitrust immunity should be provided to take it through a transition period.

We have always felt that, while the Board did not come down foursquare on that position, it provided for a 2-year period before the antitrust immunity would be withdrawn with this phase-in on the online ticketing and with an opportunity for review, prior to January 1, 1985, of the question of antitrust immunity.

One of the problems with the case was that it was an enormous proceeding. It went for several years and there are hundreds and hundreds of pages. And, having reached its decision, we have felt that the Board could now home in on the standards that are regarded as not producing an antitrust problem, or as being legitimate but about which there might be an antitrust question.

Having gotten through all of the issues, we understand that the CAB remains ready to entertain that case, revisit that issue and consider that question. We strongly endorse that position.

We do feel that the case should be made in front of the Board, which has the background and the history, and take the run through the CAB rather than superimposing upon the Board's judgment and foreclosing that review with the legislation proposed.

Mr. **Ruden**. Senator, if I might, with all due respect to the Department of Transportation, two points. One, they identified parts of these programs which the Board left in effect, which in DOT's judgment retained serious anticompetitive features. That is what their brief said and they have never retracted those statements. That in and of itself gives rise to a need for antitrust immunity that transcends any transitional period, if you wish to keep, as the industry does, the settlement process by which 100 million traffic documents are settled each year at a nominal cost between 22,000 agents and 130 airlines.

Second, the Board's decision, as distinct from statements made after the decision, does not tell the industry that if you fix up your agreements in a satisfactory way and bring them back we will confer antitrust immunity on them. What the decision does is to say you will now be subjected to the full brunt of the Sherman Antitrust Act and the civil and criminal penalties that are contained in that enactment, and it is your problem, the industry's problem to go out and find a way to live with that statute.

Now we have had a lot of talk here about choices between regulation and deregulation, which really I think is not the question. But in this particular respect you must understand, I respectfully suggest, that subjecting these agreements to the Sherman Antitrust Act is in no sense deregulation. It is simply a shift in the method by which the Government acts against the parties to the agreement.

So the Board now says "we are willing to reentertain these questions," but that is not what their opinion said. And there is no reason to think, as the Chairman candidly says, that the majority of the Board is of any different view now than it was 6 months ago.

So unless Congress steps into the situation, there is very little if any realistic possibility that the outlines of the Board's decision are going to change in any material respect.

Senator **Kassebaum**. I would like to follow on the question of antitrust immunity a moment because Mr. Phillips, you stated in your testimony that standardized reporting and remitting requirements could not exist without antitrust immunity. But it is my understanding that the airline-to-airline equivalent of that system, the clearinghouse, has not been subject to antitrust immunity for over some 40 years of its operation and has succeeded very well.

Could you make a comparison there between——

Mr. **Phillips**. Yes, Madam Chairman. The airline clearing process, which is a net settlement that occurs about once a month, is really an agreement between themselves and a behavior between themselves that doesn't affect anybody but the parties who are involved in the transactions. And clearly there is nothing antitrust-sensitive about that activity.

The area settlement plan, however, involves third parties. It involves travel agents and it involves a collective activity of the airlines. And collective activities immediately raise the eyebrows of the antitrust enforcers.

It is true that standardized reporting and remitting per se probably are not antitrust-sensitive, but that is not all the program is about. The standardized reporting and remitting that is of interest to the airlines and what makes the program work is that there are essential sanctions and follow-up activities which affect accreditation as well, and without them there would not be any useful reporting and remitting standardization. Without them, the airlines wouldn't be interested in the program. And with them, there is an absolute need for antitrust immunity.

Senator KASSEBAUM. That is why I am not sure why—for instance, Congressman Anderson pointed to the PGA when he was testifying. And that has withstood the scrutiny of the antitrust action. And I wonder, if indeed there really is a case to be made, that this would fall immediately if it would not be immune from antitrust.

Mr. MEREDITH. Madam Chairman, we believe that if the immunity was taken away from the area settlement plan, that we would not be able to remain in the area settlement plan because we would be subject to a vast number of what I would call vexatious antitrust suits.

As you know, Madam Chairman, a lot of people in this country will sue at the drop of a hat if they think possibly they may get a fast buck. And if in the process they do that, we could end up with very expensive costs.

So far from the removal of antitrust immunity producing lower costs, as the chairman said, I would suspect it would increase our costs because we would have to hire a vast number of accountants to run a separate accounting system for each one of the airlines.

Mr. REIN. Madam Chairman, on that issue of immunity in the area settlement plan, it is possible that the plan might survive an antitrust challenge. Indeed, we would defend it. We run something called the cargo agent settlement system, very similar to the ASP, and we would defend it under the antitrust laws as we defended it before the CAB.

I think the most fundamental question is just one of good order and commonsense. The CAB took a hard look at the procedures and options in the area settlement plan and the CASS. The DOT took the position that they were anticompetitive and that the plan should be at least amended to have multiple settlement options.

The airlines took the position that the only cost-effective way to run the program was on a single settlement cycle. Other parties to the case also challenged that settlement cycle and wanted it extended or contracted.

We did a thorough competitive evaluation of it. We had a balancing by the Board, which is certainly not an anticompetition agency, of the merits and demerits of doing it the airlines' way. At the end of that balancing, the Board said we're satisfied; we believe that the efficiencies that you generate by doing it on a uniform cycle outweigh any of the advantages that might arise from individual bargaining, airline to agent, on periods of settlement.

Now the question of antitrust immunity is really one of finality. If the Board says we have balanced it and we think on balance, after thorough evaluation on the record and hearing everybody out, it is good, why should every agent that goes bankrupt—and it will happen—sue us because the cycle was anticompetitive? Why should we go through that in district court after district court all over this country with varying results? What is the common sense of that? Where does that make sense?

This thing has been evaluated. The finality of this decision would be the Board saying we approve it, which they did, and we are going to prevent people from raising that same question continuously in lawsuits throughout the country, which they didn't. We don't see how that decision to permit people to try it out over and over and over again has anything to do with deregulation, efficiency or anything else.

The Congress provided a vehicle and a duty for the CAB, and as a vehicle for examining those agreements, it has done so. They have heard everybody out. The question is, why can't we settle this thing once and for all? Why does that program have to go on at risk? The difference between the clearinghouses, and we operate one too, and the area settlement plan is as to the first, the clearinghouse, nobody is going to sue about it. As to the second, there are going to be lawsuits, and expenses. We need finality. That is the point.

Senator KASSEBAUM. Mr. Santana?

Mr. ROBERTS. Madam Chairman, my name is Barry Roberts and I am counsel to ARTA.

The essential feature of the area settlement plan is that the carriers collectively get together and they set the terms and the time of payment. Collectively they tell 22,000 travel agents, this is when you pay and this is how you pay. You don't have to be an antitrust expert to say that there is one big antitrust risk in running that kind of a collective operation.

And that is the essence of it as far as the agents are concerned, and it would be very difficult for the carriers to run that kind of collective program because as Mr. Rein says, as soon as somebody feels that they have gotten burned by that program, there is going to be a lawsuit. That is it, plainly and simply.

Mr. WILLIS. Madam Chairman, my reaction in hearing what I think at first blush are very reasonable positions, is why don't you argue them out in front of the Board? Why don't you take it and take that proceeding on——

Mr. REIN. Madam Chairman, we did, as Mr. Willis knows, And he was on our side and he lost right with us.

Mr. WILLIS. Let me just finish the sentence. As I mentioned earlier, the question came in the context of an enormous proceeding, and now that we have sifted through the issues and you can more precisely state them, I think you simply have a more educated process on the particular question of antitrust immunity.

And I would say that that position is quite different from a position of support for the legislation, which simply imposes Judge Yoder's decision. That goes way beyond the single question of antitrust immunity for legitimate standards and an area settlement plan. That is why I think it is worthwhile for these groups to go back to the Board on that question.

Senator **Kassebaum**. Thank you, Mr. Willis.

Chairman McKinnon, I would like to ask you a question because you state in your testimony that if interlining were threatened, the CAB could step in. What form would this intervention take, and could any action be taken to insure the continuation of interlining?

Mr. **McKinnon**. Well Madam Chairman, we feel on the interlining issue that the claim that it is going to fall apart is just scare tactics, from the standpoint that there is an economic need and there is an economic incentive for interlining to continue.

We lost power over interlining January 1 of this year, so we can monitor it under our rules and see if there is an abuse and if an abuse comes to our attention where one or two airlines might try to dominate it, then we could take action under 411 and some other sections. But we don't believe that there will be a problem.

The Congress might want to solve the problem by instead of passing this bill that you have before you, you might just want to do something that absolutely guarantees interlining and that might solve all the dissent that you have here in the room today. That seems to be one of the big arguments, so if you just pass a piece of legislation that guarantees interlining, that might put to rest all these arguments.

Senator **Kassebaum**. Mr. Phillips, do you see any objection to mandatory interlining?

Mr. **Phillips**. There are some problems with mandatory interlining. That is really inconsistent with the deregulation of routes and services which the Congress did and which now is a fact of life. And mandatory interlining would reverse that, and you really ought not to do that unless you take a careful look at what you are doing in the context of the whole regulatory scheme.

Mr. **Ruden**. Madam Chairman, once again I see that the committee is being presented with false choices in the hopes that you will view one of them as too Draconian and the other one as too suspect and thus choose neither.

What the agency programs do, which we told the Board and what there was extensive testimony about, is that they facilitate the ability of willing airlines to interline with each other on a comprehensive and virtually, but not totally, universal basis. And it is that which the industry seeks to secure.

They are not asking the Government to compel every airline to interline with every other airline. That is the essence of the problem here. They have found a device which virtually everyone conceded to some extent facilitates, makes easier, makes more cost effective the interline process, which is a very complex process. And that is what we are trying to secure.

So these other alternatives really are false choices, and I think one has to be very careful in looking at a complex industry interrelationship like this and being forced to choose between such drastic alternatives. That is not what this problem is all about.

Senator **Kassebaum**. I do not quite understand. You regard mandatory interlining as a drastic choice?

Mr. **Ruden**. It is drastic in the sense that it is a polar alternative, total freedom versus total——

Senator **Kassebaum**. But essentially we have now a system that does require interlining.

Mr. **Ruden**. No.

Senator **Kassebaum**. Well, not by legislative fiat, but that is really what——

Mr. **McKinnon**. By economics.

Senator **Kassebaum**. That is what has occurred by the system that is in place.

Mr. **Ruden**. There are many carriers today that voluntarily choose not to interline for all of their services, for any of their services. There are some carriers that interline to a substantial degree, but not in some cases.

And most airlines, I suppose on a statistical basis, choose to interline to the maximum degree possible, and the programs help those who wish to do it as an independent business choice, interline to the extent that they choose to do so.

Senator **Kassebaum**. Why would that not occur?

Mr. **Ruden**. We have never said—and again, we are hearing these polar alternatives. We have never said that all interlining will cease to exist with the implementation of the Board's decision. I do not believe that is true and I do not think anyone at the table thinks that is true.

Interlining will, however, become extremely more costly and complex to implement, to accomplish. It will be especially more difficult to do it in a way which the public can cope with. So what the program is all about in that sense is keeping costs and therefore airfares down. If the cost of interlining goes up, even under the Board's own theory, there is going to be a lot less interlining going on.

In international markets, if those costs go up I suggest the effects could be very drastic indeed. Mr. Meredith is more expert about that than I am. But it is a question of facilitation and the level and extent and universality of interlining.

Today you can go almost anywhere, almost anywhere. Tomorrow, under the Board's decision that will not be true. The same economic theory on which the Board proceeded tells you it will not be true.

Senator **Kassebaum**. I guess I fail to see why that will not be true, if it is so advantageous.

Mr. **Meredith**. Madam Chairman, could I help with that?

Senator **Kassebaum**. Wait just a minute, because I do not really think we are talking about polarization here. I think we are all trying to sort through what will work best, and it is your argument that it will work best under the present system.

Mr. **Ruden**. Which produced the almost universal interline service which you now see throughout the United States and indeed throughout the world.

Senator **Kassebaum**. Because it has worked well.

Mr. **Ruden**. Yes.

Senator **Kassebaum**. It has been effective. It has provided a stability that is important. All I am saying is, why would that not continue, if indeed it has worked well to everyone's advantage? It is my guess that the carriers, if there is not some effort to see that this still is part of the plan, would realize that they might choose to not participate in interlining as they have.

Mr. Phillips.

Mr. **Phillips**. When we talk about the impact on the interline system, we're not talking about any one feature of the Board's decision. We are talking about the expectation in our case that come January 1, 1985, there will be no antitrust immunity of the program, and that the other features of the Board's decision which it is trying to encourage will take place.

A key part of the present program is the standard ticket which every travel agent uses and can imprint any airline's plate on that ticket, and that becomes the ticket of that airline and it can interline to whatever extent the ticketing airline has agreement to allow that to happen. That is the system today and it facilitates interlining. Any travel agent can write you a ticket anywhere in the world, the same as any airline may do so on its own ticket stock.

The two-pronged part of the Board's decision which threatens the facility of interlining is: No. 1, the end of antitrust immunity and the end of the area settlement plan as we see it, and therefore the end of the standard ticket; and No. 2, the shift away from industry agents to agents of individual airlines, so that an agent is the agent of airline X.

It will not necessarily be able to sell on other airlines as easy as it can now and connect on other airlines. But it may connect on two or three airlines through the interline arrangements of the airline which it represents.

And therefore when we say a passenger could arrive at a destination with a ticket for that airline including some interline provisions written by an agent and wants to change his plans and find some alternative arrangement that is more desirable but is not tied to that previous interline process, it cannot use the system. Today it can. And that is why we say the interline system has the potential to suffer from this activity.

Senator **Kassebaum**. If you remove antitrust immunity from the area settlement plan.

Mr. **Phillips**. That is correct, that is the key factor.

Mr. **Meredith**. Madam Chairman, it is particularly relevant internationally, where you get much more substantial financial costs for the consumer if it went wrong. Because we know that the agents who issue tickets on the standard tickets in the States are approved to have standards; they know the rules of how you issue tickets; they understand the requirements for international travel; we honor those tickets, and if something goes wrong with those tickets we stand behind them. And if the ticket is wrongly written and if the passenger ends up in some far-flung corner of the world with lots of problems, we will deal with it and we will accept the mistake and put it right.

But we could not possibly be asked to accept a situation where we honor agents which we have not approved and which we do not even know are capable to issue tickets. The passenger ends up, shall we say, in Wagadugo or somewhere. He gets stuck because the ticket is not accepted by the carrier in that country. He does not realize the risk, because the consumer in this country generally expects agents can issue tickets on any airline. He can be stuck in

Wagadugo for a week and a very expensive hotel bill, and the airline in that country may not in fact recognize that agent.

The interline system will not stop, as one of my colleagues says. It will still continue, but it will become a vastly more complicated system and certainly will not be in the interests of the consumer. It will make the consumer's life much more difficult.

Senator KASSEBAUM. Thank you very much.

I think we will have to move on to others who are testifying. I very much appreciate your willingness to participate in the discussion.

Mr. MCKINNON. Thank you, Madam Chairman.

Senator KASSEBAUM. Mr. DeMuth and Mr. Baxter, it is a pleasure to welcome you: Mr. Christopher DeMuth, Administrator for Information and Regulatory Affairs, Office of Management and Budget; Mr. William Baxter, Assistant Attorney General for Antitrust, Department of Justice.

STATEMENTS OF CHRISTOPHER DeMUTH, ADMINISTRATOR, OFFICE OF INFORMATION AND REGULATORY AFFAIRS, OFFICE OF MANAGEMENT AND BUDGET; AND WILLIAM F. BAXTER, ASSISTANT ATTORNEY GENERAL, ANTITRUST DIVISION, DEPARTMENT OF JUSTICE

Mr. DEMUTH. Madam Chairman, I appreciate very much the privilege of testifying before you this morning. I have submitted a formal statement for you and your colleagues. With your permission, I propose to speak directly to the issues raised by S. 764, and to explain why the administration is so strongly opposed to this effort to overturn the Civil Aeronautics Board Competitive Marketing decision, and leave my formal statement for the record.

Senator KASSEBAUM. Thank you.

Mr. DEMUTH. Thank you.

I would like to emphasize at the outset that the issues raised by S. 764 are closely related to the larger issues of airline deregulation that we have been hearing so much about in recent weeks. The CAB's competitive marketing decision is not only consistent with, but a direct consequence of, the airline deregulation policy adopted by Congress 5 years ago this month.

To reverse the Board and reinstitute the decision of the administrative law judge in the case would establish in the ticket marketing industry a system of government entry control and private market cartelization closely akin to that in the airline industry generally until the mid-1970's, and now blessedly a thing of the past.

Recently new voices have been raised against airline deregulation. They will grow stronger over the next year, and they are already being used against the CAB's decision at issue here today. We believe these arguments are incorrect in general, just as they are incorrect in the particulars of this case.

The purpose of airline deregulation was not to protect existing firms. Yet we must recall that mergers and reorganizations to avoid bankruptcies were not at all uncommon during the period of airline regulation. One can recall, for example, the Capitol-United merger, the Northeast-Delta merger, the Lake Central-Mohawk merger, and several others designed to save failing firms and similar to reorganizations we are seeing in the industry today.

But the purpose of deregulation was to promote better service, lower fares, and more efficient operating practices within the airline industry, and all of these have happened or are happening. Fares are generally much lower than under regulation, dramatically so on high-density routes. This has resulted in more airline service and more airline employment in the United States than was ever the case before airline deregulation—and this during a period of serious economic recession.

In fact, deregulation itself was the Congress' response to the CAB's failure to manage the industry well over several decades of good times and bad economic times, leading to chronic overcapacity and an inability to adjust to economic change. An important part of the background of the 1978 act was the substantial layoffs of airline employees in the mid-1970's which resulted from airline management's inability to use the price system to keep output up during periods of recession.

So I think we must remember here and in the debates to come that the purpose of transportation deregulation is a freer, more efficient and more productive transport sector in the United States, not protection for any individual industry segment.

The administration is utterly resolved to see the process of airline deregulation through its final stages during the next 15 months. We believe that Congress response to the competitive marketing investigation decision is a signal event in this unfolding policy drama, and we urge Congress to use it to display its own resolution.

I would like to turn to the particulars of the debate concerning the CMI decision. I believe that all of the particular issues that have been raised, such as consumer protection, business travel departments, interlining, and so forth, can be reduced to three fairly simple and straightforward issues.

The first is whether those aspects of current ticket marketing arrangements that are generally understood to be efficient and in the interests of consumers—such as the area settlement plan, interlining procedures, and travel agent accreditation—will collapse with the end of antitrust immunity.

We believe there is no reason whatever to think they will. These are efficient arrangements. They are good for industry and good for consumers, and they raise no antitrust problems. They have persisted over the years, despite earlier CAB decisions withdrawing certain antitrust immunities. They have persisted over the last 9 months, since the remaining antitrust immunities began to be lifted under the CMI decision. And interlining, of course, was not even a subject of the CMI proceeding.

We know of no persusive examples of why arrangements such as these will not survive and prosper when this industry faces the same Federal legal policies as other industries in the United States.

The second issue is whether the exclusivity clauses, the 20-percent rule, and others which are clearly antitrust violations in that they are horizontal agreements among competitors not to compete in a given area of service, should nevertheless be permitted in this industry through continuing antitrust exemptions.

We believe these kinds of agreements should be forbidden in this industry as elsewhere. They are not necessary to efficient marketing arrangements; they raise consumer prices, and, as the CAB decision thoroughly documented, they deter the introduction of innovative new marketing techniques. It is no answer to these problems to say that new marketing techniques can also emerge within the current regulated structure.

It was said earlier this morning that antitrust policy is an alternative to Government regulation, and that is so. And nothing more thoroughly illustrates the inconsistency of S. 764 with the general policy of airline deregulation than that the re-institution of antitrust immunity through the ALJ's decision would require a new Government entry control program to determine which ticket agents outside the conference system would be permitted to sell airline tickets in the United States. At this point, no one even knows who would administer this new regulatory program.

The third issue involves those aspects of the current conference arrangement and ticket conferencing system that may or may not raise antitrust problems—arrangements which are neither free and clear, such as the area settlement plan, nor hardcore Sherman Act violations such as the exclusivity clauses. The CAB observed, for example, that certain aspects of the accreditation procedure, such as the 35-mile rule and the qualification requirements for branch managers, were "unduly restrictive."

We believe that these arrangements would not present serious problems once the exclusivity clauses themselves were removed. If these provisions are unduly restrictive, and provide levels of service consumers do not want, they will wither away once new forms of marketing are free to emerge. If, on the other hand, the accreditation procedures involved persist under free entry and open competition, this will be very strong evidence that they are in the interests of consumers and free of antitrust problems.

There is the more difficult problem, however, involving vertical price maintenance. At present, the courts consider this a violation of the antitrust laws even where, as may be the case in airline marketing, it is efficient for individual firms to agree with retailers on the retail price in order to encourage more sophisticated marketing techniques or more heavy investments in retail marketing.

If this is a problem, however, it is certainly not limited to the marketing of airline tickets, but is pervasive in the American economy. The Antitrust Division is taking firm steps to remedy this defect in the interpretation of the antitrust laws. Certainly it is not a fair or effective solution to grant a broad antitrust exemption to one particular industry in order to avoid a narrow problem that affects all industries.

In summary, we believe that the CAB made the right decision in the CMI case. We believe that reversing this decision would be bad policy in itself, and very bad precedent as the last stages of deregulation begin to unfold and various efforts to reverse the policy are mounted throughout the Halls of Congress. For these reasons, we are strongly opposed to S. 764 and urge this committee to reject it.

Thank you very much.

[The statement follows:]

STATEMENT OF CHRISTOPHER DEMUTH, ADMINISTRATOR, OFFICE OF INFORMATION AND REGULATORY AFFAIRS, OFFICE OF MANAGEMENT AND BUDGET

Mr. Chairman and Members of the Subcommittee: I am pleased to appear and testify concerning S. 764, the proposed "Air Travelers Security Act of 1983," which would reverse the Civil Aeronautics Board's decision in the *Competitive Marketing Investigation.*

The Administration enthusiastically supports the CAB's decision, which is entirely consistent with our policies of eliminating unwarranted government regulation of private commerce and judging business arrangement in competitive markets according to the principles of economic efficiency embodied in our antitrust laws. For these reasons, we are strongly opposed to S. 764.

The premise of S. 764 is that unregulated competition would have a destructive effect on the marketing of airline tickets. This view of market competition as an inherently destructive force was advanced with equal fervor, and unequivocally rejected, at the time the Airline Deregulation Act was passed in 1978. Subsequent experience demonstrated that market competition dramatically improved the performance of the airlines. In a period of economic recessions, steeply rising fuel prices, and general market uncertainty, the established airlines and their newer competitors have controlled costs better, adopted more efficient methods of operation, and offered passengers a wider range of fares and services than at any time under regulation.

S. 764 reflects a desire to halt the deregulation process before it has completed its natural course. The result would be a schizophrenic system in which individual airlines were expected to make pricing and entry decisions in competition with other airlines, while similar competition in the distribution of airline tickets was severely restrained and indeed sanctioned by the government.

The suggestion that S. 764 would permit competition is misleading. Under this bill, the airlines would collectively refuse to deal with any ticket agent who had not been approved to do business by the Air Traffic Conference (or the International Air Transport Association in international routes) or by the federal government. It is instructive in this regard to recall that even in the heyday of CAB regulation, competitive entry was permitted if its "need" could be "proven"—not to the satisfaction of the individual airline companies who were taking the financial risks, but to the satisfaction of regulators in Washington who were not. The administrative law judge's opinion that would be adopted as law by S. 764 would continue such regulatory controls in an important part of our air travel industry. For example, the ALJ opinion itself concluded that certain firms were "not inappropriately excluded"—a regulatory, not a marketplace, decision. Only Ticketron was granted a regulatory "exemption" after a three-year hearing in which it was required to prove to the satisfaction of the judge that its proposed service was "economically viable" and would not threaten the business of other travel agents. And Ticketron's entry was approved only with severe economic restrictions that would not apply to other agents, but would apparently apply to non-ATC agents who might be permitted to enter in the future—a classic example of the kind of government market-jiggering that has proven so futile so often in the past.

Thus, S. 764 would replace a system that allowed no competitive entry with a new regulatory system—in which government-approved entry would occur to the extent firms were willing to assume the substantial costs of winning government approval and could prevail over the opposition of existing firms. Experience with this kind of system during the past 40 years of airline regulation strongly suggests that it would stifle price and service competition and retard innovation in the face of changing market conditions. That it is not even clear which agency of the federal government would administer the ALJ's ticket-agency entry controls after CAB sunset in January 1985 is a further indication of the sharp conflict between S. 764 and current airline deregulation policy.

Nor is the closed, regulatory system that S. 764 contemplates necessary to protect consumers or to prevent chaos in air transportation.

For many years, conference agreements among the airlines and travel agents have contained "exclusivity clauses" stating that member airlines will compensate only conference travel agents for writing tickets. Because all major airlines are members of these conferences, the exclusivity clauses effectively prevent the marketing of tickets except through conference-accredited agents. While several aspects of the conference agreements appear to provide substantial economies in ticket marketing, exclusivity clauses adopted and enforced in concert by all carriers and agents are strongly anticompetitive and unnecessary to provide the benefits of the conference system.

By phasing out these exclusivity clauses, the Board is not threatening the beneficial aspects of the conference system or the economic viability of full-service travel agencies. Both the airlines and the travel agents have strong economic incentives for continuing the conference system. No other mechanism provides the airlines with comparable market access, or provides ticket agents with a comparable scope of transportation alternatives. By eliminating the need for every airline to negotiate with every travel agent, the conferences reduce the marketing cost of air transportation. Central processing of funds through area banks provides significant savings for both airlines and agents. Banks will continue to provide this service without exclusivity or antitrust immunity. To the extent that full-service travel agencies continue to provide important services to travellers, they will survive and prosper under the test of the competitive marketplace that other business men and women face every day.

Thus, the question is not whether the existing system has any desirable features. The question rather is why the airlines would give up the beneficial aspects of the conference system when they are simply required to eliminate easily severable anticompetitive restraints on decisions of individual carriers. The question suggests its own answer. The airlines have already remained in the conferences over the years in the face of many decisions of the Board eliminate various anticompetitive provisions. In the nine months since the CAB's *Competitive Marketing* decision, airlines have been free to negotiate individually, on a limited basis, with ticket agents. There has been no collapse of economically beneficial ticket distribution arrangements, nor is there any reason to expect such results when all anticompetitive restraints are removed in 1985.

In addition, granting immunity creates risk that the protection will be abused. Examples include travel agent exclusivity and the "35 hour rule." The CAB found these conference provisions respectively "anticompetitive" and "probably unduly restrictive." As such, they inhibit potential competition, which could benefit the traveling public.

Further evidence of this problem can be seen in the battle between travel agents and business travel departments (BTDs). BTDs are departments of large corporations which write airline tickets for the traveling needs of their employees. They perform the same functions as travel agents, but ATC rules preclude BTD's from accreditation in their own right. Instead, they affiliate with an accredited travel agency, often an agency specializing in BTD's known as an "in-plant." Airlines typically pay in-plants a 3% commission on tickets they write, which is then split with the BTD.

Earlier this summer, certain airlines started paying "overrides" (commissions in excess of the base 3% rate) to in-plants that did large volumes of business on their flights. In response, another group of airlines announced that they would increase the 3% commission to 10%. At the ATC meeting on August 10 and 11, the ATC passed a resolution removing the definition of in-plants from their by-laws, effectively defining them out of existence. Within a few weeks, nearly every major airlines announced that it would stop paying commissions to in-plants.

Although this strategy eventually failed, it points clearly to the type of abuse that a grant of antitrust immunity affords. By defining in-plants out of existence, the ATC—an organization of the airlines—agreed not to compete for large corporate customers by paying commissions to finance cost-sharing between the in-plants and BTD's. The CAB's decision to discontinue the antitrust immunity will prevent such abuses, without endangering the ATC programs which provide public benefits and are not anticompetitive.

An equally unsupported argument is that, under the CAB decision, airlines would discontinue interline arrangements, which account for a substantial amount of airline revenue. The interline agreements are distinct from the travel agent agreements and were not the subject of the *Competitive Marketing Investigation*. The lack of connection between the two is illustrated by the fact that airlines currently accept interline tickets freely even when they are not written by travel agents. The Board's decision carefully explained why and how airlines will continue interline arrangements in the future without any required revisions to interline rules. Airlines will continue to use proven marketing outlets such as travel agents, and they will not abandon interline arrangements, because these arrangements make economic sense.

The Board's essential conclusion in its *Competitive Marketing Investigation* was that the provisions of travel agency agreements should face the same antitrust scrutiny as similar agreements among competitors in other industries. The Board has come to the same conclusion after reviewing other airline industry agreements in the past. Its policy, with which we are in full agreement, is to replace detailed regulatory oversight, required when an agency grants antitrust immunity, with conventional antitrust policy in which courts intervene only if serious competitive abuses can be proven. Airline ticket settlement and interlining arrangements do not present antitrust problems—unlike the exclusivity clauses, they are not agreements among competitors not to compete along a specified line of service quality. (The inter-airline ticket settlement process has never had antitrust immunity and has never been challenged.)

It may also be the case that, here as in other industries, some vertical restrictions on product distribution are economically efficient and increase consumer welfare: if this is so, then here as elsewhere such restrictions should not be proscribed by the antitrust laws. To resurrect the ALJ decision in this case—which would sanction blanket restrictions that apply both horizontally and vertically across two entire industries, and necessitate government entry controls—would be bad for antitrust reform as well as a serious retreat from the policy of transportation deregulation the Congress has steadfastly adhered to for the past five years.

Senator **Kassebaum**. Thank you very much.

Mr. Baxter.

Mr. **Baxter**. Thank you, Madam Chairman.

I, too, have submitted a formal statement for the record, which I will not take the subcommittee's time to read. Indeed, I am able to subscribe to the statement that Mr. DeMuth has already made, and I think that I will not even fully summarize the statement that I have given to you.

Rather, in the interest of time, I would like to focus on two or three specific points that I heard discussed this morning with, I am afraid, a good deal of misunderstanding. That may be a charitable way of describing it.

There is no prospect whatsoever that the clearinghouse arrangements that are presently in use, by which funds are remitted from the network of agents to the airlines, would raise or ever be challenged as antitrust violations. There is nothing about them that is restrictive or raises serious antitrust problems, even nonserious antitrust problems.

The same thing can be said of the process of interlining. The notion that in the absence of antitrust immunity interlining would somehow become more difficult is simply not true. There is nothing about interlining that is anticompetitive or would give rise to antitrust problems.

There is no antitrust difficulty with the continued use for those airlines that find it convenient and efficient, and I would expect that most would, for using the standard ticket. There is no obstacle to the airlines' agreeing to recognize tickets written on the ticket stock of other carriers.

All those things can go forward exactly as they have in the past. The notion is about as silly as the notion that for some reason or other Sylvania would not be able to manufacture light bulbs that fit in the same sockets that General Electric light bulbs fit in. It is a matter of industry standardization that is faced by a wide range of industries. It is solved without antitrust difficulty in a wide range of industries. And the idea that such resolutions raise serious antitrust issues would have to be described as fanciful.

There is one aspect of the present regime, of the examiner's decision, if put into effect, as this bill would do, that would raise very serious antitrust problems. That is that it continues to authorize, under continuing antitrust immunity, collective decisionmaking with respect to marketing, both by the airlines and by the agents.

Instead of making agreements with carriers one by one, and instead of carriers having the freedom to experiment with new dissemination methods, we have essentially a cartel of travel agents who wield enormous influence by their constantly implicit threat collectively to divert business away from a carrier which introduced or attempted to introduce new and innovative distribution methods.

And under the sort of halfway deregulation we have now, the airlines are free to compete for the loyalty of travelers through the commission arrangements. That used to be the quid pro quo, of course. The airlines collectively determine commission rates, and when that particular feature went out we saw commission rates increase from around 7 percent to around 10 percent, where they are now.

What we would be foresaking in continuing this decision, as Mr. DeMuth has already indicated, is the emergence, probably using new technologies, of new methods of distribution of airline tickets which could bring the final price of air transportation to consumers down. And there is no reason whatsoever why we should foresake that particular aspect of rivalry in the airline transportation business.

I, too, Madam Chairman, strongly urge that this legislation not be enacted.

[The statement follows:]

Statement of William F. Baxter, Assistant Attorney General, Antitrust Division, Department of Justice

Mr. Chairman and members of the Subcommittee: I very much appreciate the opportunity to be here to discuss S. 764, a bill entitled the "Air Travelers Security Act of 1983." The bill would continue unnecessary impediments to competition in the sale of airline tickets and thus raises important issues about whether the Congressional decision to deregulate the airline industry will effectively be implemented and about the future of competition in the marketing of airline passenger service.

The bill would simply direct the Civil Aeronautics Board (CAB) to vacate its decision in the *Competitive Marketing Investigation*[1] and would require the CAB to adopt the decision of the administrative law judge—a decision that the CAB had rejected in two key respects. First, the CAB declined to continue approval for the "exclusivity" provision of the airlines' agreement, which was the focus of the investigation; second, it declined to continue antitrust immunity for the remaining provisions of the agreements it approved. The bill's effect essentially would be to reinstate the past scheme whereby airlines were permitted under a grant of antitrust immunity to agree among themselves to limit ticket sales to a set of collectively approved travel agents. By contrast, the CAB's decision, if allowed to stand, would remove the antitrust immunity previously afforded these agreements, but, of course, would permit each airline to deal (or not to deal) with any ticket seller it unilaterally chooses, including travel agents and other outlets. The Board's decision would also permit an airline to impose conditions on its agents, subject only to relatively narrow constraints imposed by the antitrust laws governing vertical relationships, that is, relationships between a supplier of goods or services and distributors of those same goods or services. Because reinstatement of antitrust immunity would be highly anticompetitive and a serious step backward in the process of eliminating unnecessary government regulation of the airline industry, the Department of Justice strongly opposes enactment of the bill.

---

[1] CAB Order 82-12-85, Dkt. 36595, Dec. 29, 1982.

Before commenting more specifically on the bill's effects, I would like to place it in perspective by recounting briefly the history of the agreements affecting travel agents that it would preserve, including the exclusivity agreement.

Since the very early days of significant air passenger transportation, airlines' ticket sales through travel agents have been regulated by the airlines acting collectively under a grant of antitrust immunity from the CAB. Under the so-called "exclusivity agreement," the airlines, through the Air Traffic Conference—ATC—and the International Air Transport Association—IATA, jointly decided that they would market their services only through their own ticket offices and through collectively chosen conference travel agents.[2] Under the agreement the airlines also collectively decided the level of commissions they would pay their accredited travel agents.

In looking at the relationship between airlines and travel agents during the many years of airline regulation, one observes that it worked out to a fairly simple quid pro quo. The airlines had immunity from the antitrust laws that enabled them collectively to fix travel agent commissions at relatively low levels. Because airlines were protected from having to compete among themselves by paying higher commissions to travel agents in order to induce sales of their services, they were able to keep their marketing costs relatively low. In addition, because of the exclusivity agreement, an airline did not have to fear that a competitor would start selling tickets in a new way that would threaten its market share—the exclusivity agreement ensured that all airlines would sell their services only through conference-approved travel agents and not through new or innovative outlets. Thus, in exchange for the limitation on their commissions, travel agents as a group were protected from competition from others, such as Ticketron and corporate travel departments, who desired to distribute airline tickets in a manner different from that of traditional travel agents. Moreover, travel agents were also partly protected from competition among themselves by ATC and IATA rules that strictly prescribed the way in which travel agents were required to operate. Under regulation, all the foregoing arrangements had to be approved by the CAB and, once approved, were accorded immunity from the antitrust laws.[3] Finally, under regulation, all persons selling airline tickets were required to charge the price specified in the tariffs filed with the CAB. Thus, travel agents were required to charge the same prices that airlines charged and so could not engage directly in price competition among themselves, that is, by accepting a lower commission on a particular sale.

When Congress passed the Airline Deregulation Act of 1978,[4] it sought to replace the existing regulatory scheme with reliance on competitive market forces wherever possible and to authorize the granting of antitrust immunity only where important transportation needs could not be fulfilled by less anticompetitive means. As a result of the Act and earlier efforts by the Board, economic regulation of air transportation began to yield to the competitive discipline of the marketplace.

For the relationship between airlines and travel agents, actual deregulation came in a series of steps. First, the agreements among airlines fixing travel agent commissions were terminated, opening competition among airlines for travel agent business.[5] As one would have expected, commissions increased, going from their noncompetitively fixed level of seven percent to a competitively determined level of ten percent. While travel agents were still protected—by the exclusivity agreement—from competition initiated by airlines seeking distribution methods of comparable value at lower cost, airlines were no longer protected from competition among themselves for travel agent business.

Indeed, because the travel agent entry restrictions were left intact, opening commissions to competition may have had undesirable side effects. It put upward pressure on travel agent commissions, without giving airlines the option of using lower cost alternatives to keep travel agent costs in check. Hence, airlines are probably spending more for travel agent services than they would otherwise spend if they were free to use retailers outside the conference program. These extra costs, of course, are passed on to consumers.

---

[2] The airlines' exclusivity agreement has been modified slightly, but this remains its essence. Under S. 764, conference travel agents would be the exclusive means by which airlines could sell their tickets through an agency relationship. Because of the broad and vague definition of an agency relationship, this is virtually the same as a flat prohibition on any sales other than through a conference travel agent. In fact, the administrative law judge was so uncertain of the agency definition that he made a special exception for Ticketron, to be sure that it (though not necessarily others) could enter.

[3] 72 Stat. 770.

[4] Pub. L. 95-504, 92 Stat. 1705.

[5] CAB Order 80-2-33, Feb. 5, 1980 (domestic); CAB Order 78-8-87, Aug. 17, 1978 (international) (international commissions had in practice been open for several years previously because of competition among carriers).

Despite higher commissions, airlines have not abandoned the exclusivity agreement. This inaction is likely the result of two factors: first, the airlines may fear that travel agents would retaliate against any airline that initiated such a change by recommending other airlines to their customers; and second, airlines may desire not to open new avenues of marketing competition among themselves.

The continued antitrust immunity of the exclusivity agreement and thus the continued protection of both travel agents and airlines from new and innovative competition was the central dispute in the Board's *Competitive Marketing Investigation.* The administrative law judge would have essentially continued the status quo in the face of clear evidence that competition among both airlines and agents was needlessly resticted and despite the fact that Congress had directed maximum reliance on competition in enacting the Airline Deregulation Act. He found that the market could not be relied upon to ensure that consumers' travel service needs were met in a cost efficient way, and he granted approval to, and antitrust immunity for, most of the agreement, including exclusivity with a minor modification, and created a special exception for entry by Ticketron, but not for others.

However, upon its review, the Board decided to disapprove the exclusivity agreement, finding that the public interest would best be served by opening entry into the airline ticket distribution industry. The Board also upheld the many procompetitive features of the airlines' agreement, such as the Area Settlement Plan and joint accreditation on factors without anticompetitive significance, as we had urged them to do. In reaching its decision, the Board emphasized the Congressional mandate to place primary reliance on the competitive market forces embodied in the antitrust laws:

"With the Airline Deregulation Act (ADA), Congress rewrote the operating assumptions in the airline industry. Government oversight of fares and services was replaced with reliance upon market forces to determine which carriers provided services and at what prices. Of course, the new reliance on competition has not been limited to entry and fares, but is to be the basis for all our decisions. That must be the starting point in this case. Absent a demonstration that the public would be better served by solutions that cannot be attained in a competitive environment, the air transportation marketing industry must be opened to the normal operation of market forces.

"As a result, we approach arguments that competition is necessarily destructive and that government intervention is preferable to the free marketplace with a large measure of skepticism. Unsubstantiated fears that competition will produce less desirable results than those produced under regulation are simply not sufficient reason to protect the present system from competition." [6]

By contrast, S. 764 if enacted would continue, with minor changes, the existing scheme of regulation. Thus, it would permit continuation of the horizontal exclusivity agreement among airlines, despite the fact that it is anticompetitive in purpose and effect and thus injurious to consumers and to society as a whole.

Because the Board's decision places reliance on the antitrust laws rather than on continued regulation, it is important to be clear about what those laws prohibit and what they allow. As a general proposition, many agreements among competitors are unlawful because they significantly restrict competition and have the effect of reducing the output of goods and services below the levels that would exist in a freely competitive market, without countervailing procompetitive benefits. For example, the exclusivity agreement that was the subject of the *Competitive Marketing* proceeding is an agreement among competing airlines by which they agree not to compete with one another through new, innovative, or more efficient means of retailing air transportation that do not fit existing conference travel agent standards. Thus, because that agreement constituted a serious restriction on competition and produced no public benefit, in the absence of immunity it would be found to be an unreasonable restraint of trade under the antitrust laws.

Not all horizontal agreements among competitors are illegal, however. For example, the essential features of the joint airline accreditation program for travel agents, if nonexclusive, reasonably related to a legitimate purpose, and nondiscriminatory, would constitute an efficient and procompetitive joint activity. The antitrust laws would not prohibit such a program, as we have noted before the Board.[7]

---

[6] CAB Order 82-12-85, Dkt. 36595, at 3-4, Dec. 29, 1982.

[7] Department of Justice Brief to the Board, Competitive Marketing Investigation, Docket 36595, July 28, 1982, at 67.

They would permit the airlines collectively to operate, and to share the costs of evaluating travel agent applications under, such a joint accreditation program.

Likewise, the airlines could continue their existing Area Settlement Plan, which is a clearinghouse for money owed by travel agents to airlines for tickets they have sold. This plan also is an efficient joint venture of the airlines, not unlike bank clearinghouses, which find no difficulty operating without antitrust immunity. Because the Area Settlement Plan does not reduce competition, it would not be prohibited by the antitrust laws.[8]

I might also note that, contrary to the assertions of some critics of the CAB's decision, interlining will not be ended or impeded by application of the antitrust laws to the airline industry pursuant to the Board's decision. Interlining, which is the practice of airlines exchanging passengers on connecting flights while using only one ticket, does not violate the antitrust laws because it does not reduce competition between the interlining carriers.

Finally, application of the antitrust laws will not seriously impede the development of procompetitive vertical relationships between an individual carrier and its ticket agents. For example, under the antitrust laws, an airline, acting individually, is free to decide that travel agents will be the exclusive means by which it will market its tickets. No airline will be forced to sell its tickets through a Ticketron or any other outlet it does not choose to use. In addition, an airline is free to enter nonprice agreements with its retailers;[9] in other words, an airline, acting individually, may require retailers it has appointed to agree to maintain certain standards or to perform certain functions.

In sum, I can assure you that the antitrust laws accommodate a wide array of both horizontal and vertical arrangements in this industry that may be necessary to provide adequate information, maximize consumer acceptance and reduce the costs of distribution.

Antitrust immunity should not be granted lightly. By preventing cartel-type agreements, the antitrust laws are designed to protect the competitive functioning of markets and thus to ensure that society's limited resources are allocated efficiently. When considering a proposal for antitrust immunity, we must be certain that there is a good reason to depart from those general principles by which our free market economy is ordinarily governed. Only if there is a market failure that could be corrected by some type of conduct, and that conduct would otherwise be prohibited by the antitrust laws, should antitrust immunity be considered. Even then, it should be granted only when there is strong reason to believe that the immunity's expected benefits exceed its expected costs.

One issue that is sometimes raised is whether there is a substantial "free rider" problem in this industry that might lead to a market failure unless the airlines are permitted agreements that the antitrust laws would normally prohibit. Some proponenets of the bill have raised this issue, at least indireclty, by predicting the decline of the existing "broad retail network" of travel agents if this bill is not enacted. In general, a free rider problem may arise in a setting in which a service, such as the provision of specialized information, is important to the sale of a product and where it is difficult or impractical to charge separately for the service. Some suppliers may determine that their product is most competitive when this service is offered without charge to the consumer, with the cost being calculated into the retail price of the product. In order to induce their dealers to offer such a service, suppliers must either compensate their retailers directly or in some way enable the retailers to earn the higher gross margins necessary to support the overhead attributable to the provision of the services. Otherwise, retailers offering "free" ancillary services will be undercut by other retailers who offer no such services. The prospect of "free-riding" by discounters on the informational services of other retailers diminishes the incentives of retailers to offer these services in amounts necessary to insure an efficient distribution system. As a result of this "free-riding", fewer of the supplier's products find their way into the market, to the detriment of consumers as a whole.

In the airline industry, a free rider problem might arise where a customer could obtain from a travel agent all the information he needed about such matters as flight times, stop-overs, and interconnections and then purchase his ticket from a no-service discount sales outlet. If such a phenomenon were widespread, it could drive out the information-providing outlets because they could not cover their costs, with the result that the information would not be available even to consumers who would be willing to pay for it.

---

[8] As we noted before the Board, there would be an antitrust problem if airlines acting in concert unreasonably denied access to, or required the use of, the Area Settlement Plan. Brief to the Board at 69–73, July 28, 1982. the airlines indicated to the Board that they do not follow either practice, so the Board did not require any changes in the Plan.

[9] *Continental TV, Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36 (1977).

While the impact of the free rider problem in the airline marketing industry is an empirical question the answer to which is difficult to predict, there are some indications that the free rider phenomenon here may not end the provision of information and other services to travelers who desire them.

First, over half of all travel agent sales are to regular business customers, for whom agents usually provide recordkeeping and other services under a contractual relationship. Second, travel agents provide many services, in addition to ticket sales, that customers may not be able to obtain from a simple ticket sales outlet (e.g., hotel reservations, car rentals, boarding passes, seat selection, frequenty flyer programs). Third, travel agents can do some screening of customers who appear only to be seeking information—indeed, they do it now. Fourth, travel agents may be able to charge for certain extensive information-providing and counseling services, as for example, in connection with vacation planning. (Until recently, CAB regulation prohibited such charges.) These and other factors may suggest why in the stock brokerage industry, for example, a somewhat comparable industry in which information is important, discount and full service retailers coexist.

If an individual airline believes, however, that greater dissemination of services and information to the public is important to maximize demand for its product, the antitrust laws permit steps to be taken to correct whatever free rider problem may exist. The Supreme Court has recognized that, in some circumstances, non-price vertical restrictions that constrain the form of intrabrand competition among retailers are a legitimate and socially desirable way to cure the "free-rider" problem and promote intrabrand competition. For example, as I noted above, in a deregulated environment an airline may confine ticket sales to distributors who provide specified information services.[10] Thus, even if the potential exists for a significant free rider problem to develop, the airlines, each acting in its own individual interest, can take remedial steps to prevent it from becoming serious without fear of liability under the antitrust laws.

The horizontal agreement among airlines that would be preserved by S. 764 could accomplish no more to solve any free rider problems than what the airlines could achieve acting unilaterally in their own competitive self-interest. Nor is the bill needed to authorize the procompetitive joint airline activities that the antitrust laws permit. At the same time, the bill raises the specter of an unnecessary, anticonsumer reduction in competition among the airlines in the marketing of airline tickets. Because of the unreasonably anticompetitive nature of the exclusivity agreement, enactment of S. 764 is likely to result in unnecessarily high ticket prices and less air passenger service than in a fully competitive market. Airlines would be permitted to agree not to use innovative or low-cost means of providing ticketing services to customers, and travel agents would be protected from the competition of alternative, less costly means of distributing airline tickets.

Congress should not adopt this outcome, which is a vestige of airline regulation. Rather, the airline ticket distribution industry should be made subject to the full application of the antitrust laws that apply to our other industries, as the CAB's *Competitive Marketing* decision would do. This result is in the public interest because it will permit the free, competitive functioning of this market. As I stressed in my testimony, the antitrust laws, properly understood, generally prohibit only those activities that unreasonably restrain competition among competitors, and they do not prohibit a wide array of horizontal and vertical arrangements that promote efficiencies and are procompetitive.

---

[10] In some circumstances, resale price maintenance may also be used to correct a free rider problem. By eliminating intrabrand price competition, the supplier may enable its retailers to provide costly promotional or informational services and thereby increase the attractiveness of its product. Indeed, it is the indirect lessening of intrabrand price competition by nonprice vertical restrictions that eliminates the free-rider problem and gives such restrictions their procompetitive potential. Price-related vertical restrictions in general, and resale price maintenance in particular, accomplish directly what nonprice vertical restraints accomplish indirectly; both types of practice are designed to increase both price and sales volume. Although under current law resale price maintenance is per se unlawful, the Supreme Court this term in the *Monsanto* case will have an opportunity to reconsider this rule. Because of the procompetitive potential of resale price maintenance, the Department in its amicus brief has asked the Court to eliminate the unwarranted distinction between price-related and non-price vertical restrictions and to analyze each vertical restriction individually in the circumstances in which it occurs to determine whether it is anticompetitive. S. 764 would not, of course, affect the question of whether airlines are permitted to engage in resale price maintenance. As suggested in the text, there is no reason to doubt that airlines will be able, through non-price vertical agreements, to assure a desirable flow of information to consumers if S. 764 is not enacted.

Moreover, even if one did not share our view of the soundness of the CAB's decision, it does not follow that S. 764 should be enacted. The Board's decision has been appealed and is at present the subject of judicial review. Thus, disputed issues of law or fact can be expected to receive appropriate attention and any significant errors corrected. It is far preferable in our judgment to allow the process of judicial review to be completed, so that the Board's decision can be subjected to scrutiny and review on the basis of the extensive record that has been developed in this proceeding, than it is to deprive the courts and the Board of further jurisdiction in this matter.

Accordingly, the Department of Justice strongly opposes S. 764 and recommends that it not be enacted.

Mr. Chairman, that concludes my prepared remarks. I would be happy to respond to any questions you or other members of the Subcommittee may have.

Senator KASSEBAUM. Thank you, Mr. Baxter.

I would like to ask regarding the clearinghouse and the area settlement plan, what difference do you see in the antitrust position between the two?

Mr. BAXTER. I just do not see that either would raise antitrust problems. If the industry has any doubt about that we have a business review mechanism available by which we could address that issue but neither one has the characteristics of the kind of horizontal agreements that restrict output and, therefore, increase price.

On the other hand, they are both agreements that tend to reduce costs, facilitate operations and thereby cause price reductions and accordingly they would raise no problems under the antitrust laws.

Senator KASSEBAUM. Well, my question to Mr. Phillips was that the clearinghouse had operated for some 40 years without antitrust immunity. Why did he believe that the area settlement plan could not operate the same way? His reply as perhaps you heard was that the area settlement plan had a third party involved and their clearinghouse is airline to airline.

Mr. BAXTER. The response you gave him, Madam Chairman, regarding bank clearinghouses, I think you suggested, is completely analogous. Again, you have paper transferred and—I mean, it is difficult for me to deal with the point because no one has really attempted to explain what the antitrust complaint would be. Other than saying I cannot imagine how antitrust problems could be thought to arise in these contexts, I do not know where to go from there.

Senator KASSEBAUM. You heard comments from the earlier testimony about frivolous law suits being raised and a great fear that there would somehow be numerous law suits. They would all of a sudden appear. Who do you think would bring these law suits?

Mr. BAXTER. Well, of course, that question should be addressed to the gentlemen who think there would be large numbers of such suits. Bringing an antitrust law suit is not an inexpensive thing to do.

Senator KASSEBAUM. I assume from his comment it would be a lot of failing travel agents that would believe that their business had failed because they had lost the immunity.

Mr. BAXTER. Yes. Well, one cannot rule out that possibility. We do have frivolous law suits in this country. It is not confined by any means to the airline industry nor is it confined to the antitrust laws.

The antitrust laws are from time to time abused. There are several features of our antitrust laws that seem to me to encourage that to some extent.

One feature is the fact that plaintiffs recover attorneys fees if they are successful, but defendants do not recover attorneys fees if they are successful. The Treble damage feature of the antitrust award again as Mr. DeMuth said of a different problem, is another problem if one sees them as problems, that are common to all of antitrust suits in all industrial America. There is nothing unique about the airline industry. If there are problems, they are problems that should be addressed directly and across the board.

We are addressing some of them in other contexts, and although one cannot categorically assert that there would be no frivolous law suits, I certainly would not see that as a reason that justified the perpetuation of a relatively broad antitrust immunity for a particular subsection of American industry.

Mr. DEMUTH. Madam Chairman, I would add that even in the worst case suggested earlier—disgruntled travel agents bringing antitrust suits—it would be unlikely in the extreme that this would lead to case after case in court after court around the country, as was also suggested. Where issues of law and legal doctrine are concerned, as opposed to issues of fact, one does not see plaintiffs bringing case after case in the face of settled precedent.

Once the law has been tested and the antitrust innocence of a certain arrangement has been established beyond a doubt, the prospects of successful litigation becomes so remote that one would be not only frivolous but foolhearty make the substantial investment of bringing another suit. In matters of legal interpretation, especially where such fanciful plaintiffs arguments as these are concerned, the judicial system is self-limiting.

Senator KASSEBAUM. Mr. DeMuth, you made a very persuasive case as far as the need for the innovation and the efficiencies that could come with this change, but I really would have to ask you what real advantage you see in this, and who is asking for this. Some consumer groups have, but I do wonder if we are going to see actually a benefit as far as cost to the consumer in this.

What is the real advantage you see in this other than in theory it should work?

Mr. DEMUTH. Of course, it is usual to begin with a position that the antitrust laws should apply to everyone and that particular industries should be exempted only on a clear showing of need which I think has not been made here.

In this case, on the contrary, there were numerous submissions to the CAB, not only from Ticketron, the one firm that managed to squeak by the ALJ's regulatory program, but also others such as American Express and the business travel departments, proposing what seemed to be promising, new marketing techniques which could not be tested in the marketplace due to the current conference restrictions.

The question arises why these firms should not be able to negotiate individually with the airlines and find out if their kind of ticket marketing service is in fact attractive to some substantial number of consumers. Nobody is proposing to restrict in any way those aspects of the current travel agent system which so many consumers obviously find attractive at present. The only question is whether that system should be subject to the same kind of day-today market test that other businessmen and women offering high quality services already face.

Senator **Kassebaum**. Thank you very much.

Mr. Baxter.

Mr. **Baxter**. Yes; I would like to say a word about that, Madam Chairman. Your comment reminds me of the situation that prevailed about 7 or 8 years ago when various forms of electronic banking and automatic teller machines were being introduced and, of course, a number of the banks were intensely opposed to their introduction because they were an innovative new form of competition.

Consumer surveys showed that most consumers' reaction was very, very cool. They attempted to say, oh no, they would rather deal with a live teller and it would be terribly complicated. The circumstance that you describe, where the industry is opposed and there does not seem to be a great deal of consumer enthusiasm, would characterize almost every situation where the question was, Should the law accommodate the introduction of new and potentially revolutionary technology?

This development signals intensified competition for the industry. It signifies the technological obsolescence of some investments that some people have already made, and consumers are rarely able to tell you what they want until they really have it available to them as a live option and they have tried it.

When they try it they either say, gee, I like it or they do not and it is rejected in the marketplace. There is no harm indeed if that is the outcome because then nothing happens. But the circumstance of an unenthusiastic or a resistant industry and an unenthusiastic consumer group is one of the hallmarks of a measure that is likely, really, to be in the interest of consumers.

Senator **Kassebaum**. Thank you both very much.

The next panel will be Mr. Jonathan Linen and Mr. James Gaffigan. It is a pleasure to welcome you both. Mr. Linen, would you like to start as president of the Travel Division, American Express Co.?

STATEMENTS OF JONATHAN S. LINEN, PRESIDENT OF TRAVEL DIVISION, AMERICAN EXPRESS CO.; AND JAMES GAFFIGAN, EXECUTIVE DIRECTOR, TRAVEL AND TOURISIM GOVERNMENT AFFAIRS COUNCIL

Mr. **Linen**. Thank you, Chairman Kassebaum.

I have previously submitted a statement for the record, and I am going to try to abbreviate that as much as possible here today. I think it is very important for us to be here representing American Express and to comment on the issues around S. 764.

As one of the oldest members of the travel and tourism industry with over 130 travel agency locations in the United States we have actively supported all major pieces of legislation that have promoted ease, economy, and efficiency in travel for the United States and throughout the world. We believe, however, that S. 764 serves neither the interest of the traveling public nor of the travel industry itself.

Our industry is going through dramatic changes. Air carriers are now free to add or drop virtually any domestic route, to price their services at whatever level they wish and most recently to market their services by any distribution channel they choose.

All this came about because of the Airline Deregulation Act of 1978 which mandated that the Civil Aeronautics Board use competitive forces to bring greater efficiency and low prices to air transportation. I believe this creative competition should continue to be encouraged throughout the industry.

S. 764, however, would preserve rules that stifle innovation, that discourage the use of new technologies for greater customer savings and convenience, and that is why American Express opposes this bill. The Airline Deregulation Act of 1978 gave the CAB a clear mandate to eliminate regulatory constraints in favor of competition, and to carry out this mandate, Congress gave the CAB flexibility to act in the public interest.

Acting on this instruction the CAB undertook 4 years ago to reexamine its approval of airline agreements that govern travel agents. American Express recognized the importance of this action, and we have been an active participant in that part of the deregulatory process formally known as the Competitive Marketing Investigation.

Our position continues to be the following: We oppose antitrust immunity for any airline agreement that reduces competition, competition between the carriers themselves, competition between carriers and agents or competition between agents. We oppose any collective agreements that restrict agents from competing on an equitable basis with any other distributer of airline tickets.

The competitive marketing decision that the CAB finally issued last year does fulfill the mandate of the Airline Deregulation Act. It does so because it asserts that the way air travel is sold should be determined by the marketplace.

As a result of this decision both airlines and travel agents will be free to develop more innovative and cost efficient ways of selling tickets to the public. Some disagree with the CAB's decision; hence, they also dispute Congress mandate that equates the public interest with industry competition.

By means of S. 764 they propose a return to protectionist policies. The bill before you would direct the CAB to reverse its landmark decision.

It would give protectionism new life by granting indefinite antitrust immunity to virtually every air carrier agreement governing the agency program. According to supporters of S. 764, the antitrust immunity that protected the industry in its infancy is still necessary for without it they say the agency program would surely die.

Such a doomsaying seems extreme when one considers that there are airline agreements that have never had immunity while others recently had their immunity removed yet all still continue to function. For example, the agreement on the airline clearinghouse for ticket sales has never had antitrust immunity while the agreement on the universal air travel plan recently lost its immunity and yet both agreements are alive and well and to the best of my knowledge have not been a source of problems for the airlines.

The history of the U.S. economic growth has shown and recent congressional action recognized that the free marketplace is the best guarantor of innovation, efficiency and improved service for the public. To conclude, I know your decision in this matter will turn ultimately on what is best for the traveling public.

My sense of the travel industry is that most forward thinking professionals accept the free market as a force for the good as something that will help both their own interests and those of their clients. I submit, therefore, that the long-term benefits which can be obtained by increased competition present the strongest argument against S. 764.

I urge that you reject this legislation and let the marketplace have the final say on the destiny of our industry. Thank you.

[The statement follows:]

STATEMENT OF JONATHAN S. LINEN, PRESIDENT, TRAVEL DIVISION, AMERICAN EXPRESS TRAVEL RELATED SERVICES CO., INC.

Thank you, Chairman Kassebaum. My name is Jonathan Linen, and I am president of the Travel Division of American Express Travel Related Services Company, Inc. I am honored to be here today to present the views of American Express on S. 764.

As one of the oldest members of the travel and tourism industry, we have actively supported all major pieces of legislation that have promoted ease, economy and efficiency in travel, for the U.S. and throughout the world. We believe, however, that S. 764 serves neither the interests of the traveling public nor of the travel industry itself.

As you well know, the industry is going through dramatic changes. Air carriers are now free to add or drop virtually any domestic route; to price their services at whatever level they wish; and, more recently, to market their services through whatever distribution channels they may desire.

All these changes came about because of the Airline Deregulation Act of 1978. Through this Act, Congress mandated that the Civil Aeronautics Board place maximum reliance on competitive forces to foster innovation, efficiency and low prices in air transportation.

The results speak for themselves. There have been some bad effects, to be sure—such as airline bankruptcies, interruption of service to certain communities and confusingly complex fares. But for the most part, deregulation has worked well, and the traveling public and industry have benefited from it.

I believe this creative competition should continue to be encouraged throughout the industry. In particular, I believe we should employ the dynamics of a free marketplace to structure the distribution system for air transport services.

By our reckoning, potential exists for tourism to move from the nation's second largest retail industry to the nation's largest. We think the industry has enough sophistication, ingenuity and technological capacity to persuade Americans and others to spend much more of their disposable income on travel and tourism. That is why American Express opposes S. 764. The bill would preserve restrictive rules that stifle innovation—that discourage the use of new technologies for greater customer savings and convenience.

This morning, I will discuss what we at American Express believe the travel industry's objectives should be regarding the public interest.

But first, I think it helpful to set the stage by offering some background on Amerian Express and on the history of travel deregulation.

American Express Company and its subsidiaries are primarily engaged in providing a variety of travel related, insurance, international banking and investment services.

The Travel Division is one of the most visible of our businesses. Retail travel services, for personal and business purposes, are offered through a network of Company-owned and representative offices worldwide. This network—which includes 130 offices in the United States—offers trip planning, reservations, airline ticketing, and package tours amongst other travel services.

American Express has more travel offices than most firms in the business, and some think that the defeat of S. 764 would benefit only us and other large agents. That is simply not true. In the travel business, competitive advantage is gained not by size but by quality of service—in particular, by service that fits the needs of localized markets.

Let me emphasize: Travel agencies, including our own, provide services to individual and corporate clients in local areas, and due to this market fragmentation, larger agencies can not count on gaining advantage from economies of scale. Furthermore, since American Express offices compete with other local travel agencies head to head, we are affected by regulatory constraints in much the same way as travel agencies with only one or two offices.

Even if overall size were a material factor, American Express operates only 130 offices of the more than 20,000 ATC-approved agencies that now exist, and last year, our sales represented less than 3 percent of total travel agency sales.

This brings us to the Airline Deregulation Act of 1978, which completely overhauled the statutory guidelines that had governed most aspects of our industry for over 40 years. As you well know, the drafting and passage of this historic Act required two-and-a-half years of dedicated legislative effort.

This Act gave the Civil Aeronautics Board a new Declaration of Policy for domestic air transportation. In contrast to the prior Policy, the CAB was given a clear and firm mandate to rely primarily on competition, rather than strict regulation, in over-seeing the industry—thereby promoting an efficient, low-cost air transportation system.

To carry out its mandate, Congress gave the CAB the flexibility to act in the public interest, without being handcuffed in every circumstance to each specific provision of the legislation. It also reduced the CAB's authority to grant approval of—or confer antitrust immunity on—air carrier agreements; this was to ensure that air transporation would be subject to the same antitrust law standards and competitive forces as other industries.

Acting on its mandate, the CAB undertook four years ago to re-examine its approval of and grant of antitrust immunity to the airline agreements that govern travel agents. American Express recognized the importance of this action and took an active part in the CAB's study, known formally as the Competitive Marketing Investigation (Docket 36595).

Briefly, our position was this: We opposed the CAB's approval of—or the extension of antitrust immunity to—any airline agreement that reduced competition between the carriers themselves, between carriers and agents, or between agents. Why did we oppose approval of the airline agreements? We voiced opposition because the agreements permit the airlines, acting collectively, to restrict agents' freedom to compete with airlines or anyone else who might wish to provide travel services to the public. In addition, these collective agreements inhibit innovation by travel agents and therefore deprive the public of the benefits of new technology. Simply put, we want travel agents to have the freedom to compete on an equal basis.

Here are a few examples of the type of anticompetitive agreements which we opposed:

One, agreements that prevented a travel agent from installing ticketing machines on the premises of a customer or on the premises of a company owned, controlled by or affiliated with the agent;

Two, agreements that imposed on headquarters and branch office managers of travel agents mandatory and inflexible experience requirements;

Three, agreements that prohibited agents from opening offices at airports;

And four, agreements that barred an agent from earning a commission on airline ticket sales to its employees or the employees of its affiliated companies for the purpose of business travel.

The Competitive Marketing decision that was finally rendered by the CAB in December 1982 faithfully executes the legislative mandate of the Airline Deregulation Act—because it embodies the belief that the distribution system for air travel should be determined by the marketplace. As a result, airlines will be able to make individual marketing decisions that are responsive to consumer demands. Both airlines and travel agents will be free to develop more innovative ways of distributing tickets to the public, for greater efficiency and lower costs. Clearly, the public will benefit from such innovation, since material improvements in customer service are already possible through advanced computer hardward and software.

Some, Madame Chairman, have disagreed with the CAB's decision; hence, they also dispute the Congressional mandate that equates the public interest with industry competition. Through the auspices of S. 764, these parties propose a return to the protectionist policies of the past.

This legislation, if enacted, would direct the CAB to vacate its landmark decision and to adopt in its place the inital decision rendered by an administrative law judge. The Judge's decision would give protectionism a new lease on life by granting indefinite antitrust immunity to virtually every air carrier agreement governing the agency program.

The proponents of S. 764 have argued that the immunity that protected the industry in its infancy is still necessary, for without it the agency program would surely die. Such words of gloom and doom seem suspect when one considers that some airline agreements have never had immunity, while others have recently had their immunity removed and still continue to function.

For example, the agreement governing the Airline Clearinghouse for ticket sales has never had antitrust immunity, and the agreement governing the Universal Air Travel Plan recently lost its immunity. Wondrous to say, both agreements are alive and well and, to the best of my knowledge, have not been a source of problems for the airlines nor the cause of any costly lawsuits.

Moreover, when the CAB issued its decision last December, it disapproved what the industry terms the "on-line exclusivity" rule, which barred individual carriers from marketing their own ticket stock through agents on terms different from those jointly agreed upon by the carriers. I am unaware of any negative fallout for travel agents or the airlines as a result of that action.

There is one final issue which I would like to address this morning: specifically, the airline agreement relating to handling and sale of interline tickets and the handling of interline baggage.

As I have previously testified, American Express is opposed to S. 764 because, if enacted, it would force the CAB to approve and grant antitrust immunity to collective airline agreements that restrict travel agents' marketing freedom and inhibit industry innovation. We believe the subject matter of these agreement should be determined by forces in the marketplace.

Now, some have argued that if the Air Travelers Security Act fails to pass, the interline system will collapse. It is true the bill would ensure continuance of existing airline cooperation on interline tickets and baggage handling. But we believe that market forces would accomplish the same thing. Government involvement here is unnecessary because the public's insistence on interline coordination will guarantee its continuation. Smart airlines will enter into agreements with one another to preserve interline coordination and serve the convenience of the traveling public.

In the final analysis, I know your decision will turn, not on what is good or ill for the industry per se, but on what is best for the consumer. I submit, Madame Chairman, that the benefits the traveling public will obtain under deregulation present a compelling argument against S. 764.

The history of U.S. economic growth has shown, and recent Congressional action has recognized, that the free marketplace is the best guarantor of innovation, efficiency and improved service for the public. I urge that you reject this legislation and let the marketplace have the final say on the destiny of our industry.

Thank you.

QUESTION OF SENATOR INOUYE AND THE ANSWER THERETO

Question. In terms of the ability of American Express to offer service to the traveling public, specifically what will you be able to offer under the Board's decision that you could not before the CMI decision?

Answer. In our opinion, the Board's decision in the Competitive Marketing Case faithfully executes the legislative mandate of the Airline Deregulation Act of 1978 because it embodies the belief that the distribution system for air travel should be determined by the forces of the marketplace. Both airlines and travel agents will be free to develop more innovative ways of distributing tickets to the public which in our opinion will result in greater efficiencies and lower costs. Clearly, the public will benefit from such innovation and improvements in technology.

More specifically, travel agents will have more freedom to select where they locate their offices. They will have the option of installing tele-ticketing machines in the offices of their business customers. Non-travel agents will have a free hand in setting up ticket-selling locations. You may see tickets sold through Automatic Teller Machines, Cable TV, or other forms of technology. The purchase of travel will become more convenient. Customer service will improve both because of the convenience factor and because agents will be forced in order to meet competition to consistently deliver high quality counselling, to provide lowest fare ticketing, to match carrier and routing to the customer's needs. These improvements will occur because deregulation will force those in the industry to compete more vigorously for the customer's loyalty.

Senator KASSEBAUM. Thank you very much.

Mr. Gaffigan, it is a pleasure to welcome you as executive director of Travel & Tourism Government Affairs Council.

Mr. GAFFIGAN. Thank you very much, Madam Chairman.

You have my full statement and in the interest of time let me just summarize it. The council is the national organization representing the unified travel industry viewpoint on legislative and regulatory issues of common concern.

It is made up of over 28 major travel and tourism organizations. This takes into consideration more than just airlines and travel agents. We are talking in terms of accommodations, attractions, food, bus, air, and the services.

Within our council we have had a number of meetings through the executive committee, task forces, and our most recent July 14 meeting of the full council where we discussed S. 764. The industry itself which is made up of these myriad numbers of components have arrived at an understanding that the existing travel agency system has responded to the travel public's need for professional travel assistance.

Travel agencies constitute a common retail outlet for a full range of travel services. That includes, as I noted, air, boat, bus, and rental car, accommodations, camping, attractions, and food.

Almost every major segment of the travel and tourism industry does in fact use the travel agent for the sale of its services. So I think the important thing that I am trying to relate now is that those who are in the travel industry which happens to be the second largest retail industry in the United States and the second largest private employer in the United States—in your own State it ranks No. 3 for employment—believe that the system does work.

It has evolved over 40 years, and it has done a good job. The general feeling is and it is the old cliche if it is not broke do not fix it.

So we strongly support S. 764.

[The statement follows:]

STATEMENT OF JAMES GAFFIGAN, EXECUTIVE DIRECTOR, TRAVEL AND TOURISM GOVERNMENT AFFAIRS COUNCIL

My name is James Gaffigan and I am Executive Director of the Travel and Tourism Government Affairs Council.

We would like to express our appreciation to the Subcommittee for providing us with this opportunity to present our views in support of S. 764, the Air Traveler's Security Act of 1983.[1]

The Travel and Tourism Government Affairs Council is the national organization representing the unified travel industry viewpoint on legislative and regulatory issues of common concern. Council membership is comprised of 28 of the largest travel and tourism national trade organizations, reflecting the diverse nature of the industry which includes transportation, food services, accomodations, attractions, tour sales and travel agencies.

The travel industry is now the second largest retail industry in the United States, having generated (in 1982) $194 billion in receipts and $20 billion in federal, state and local tax revenues. It directly employs 4.5 million Americans at every level of skill and indirectly provides another 2.2 million supporting jobs. There are over one-half million U.S. businesses serving the traveler and, paralleling the travel agent

---

[1] The American Express Company, a member of the Council has no objection to the CAB's decision, and is therefore opposed to S. 764.

segment of our industry, nearly all are small businesses (as classified by the Small Business Administration).

While the decision rendered in the Civil Aeronautics Board's Competitive Marketing Investigation will vary in its impact on each industry component, it is clear that the implementation of any federal policy arising from this case will widely affect the industry as a whole.

The Council has concluded that the travel agency system offers important advantages to both the travel and tourism industry and the traveling consumer. We are justifiably concerned that, absent an equally effective distribution system, destruction of the agency system may result in serious adverse consequences for the public and the travel industry, including the potential economic dislocation of over 18,000 small businesses.

It is important to note that airlines depend on ATC-accredited travel agents for 60 percent of their domestic ticket sales and at least 75 percent of international ticket sales. The accreditation system provides airlines and many other segments of the travel industry with direct marketing and selling access to communities throughout the nation, including those remote from individual locations of industry facilities and airline route systems. This system, which is currently threatened by the CAB's decision, has very effectively met the consumer need for easy access to experienced travel advisors competent to counsel and inform travelers about travel and transportation options. Further, interline agreements and accompanying antitrust immunity, are an essential element of the consumer convenience the public has come to expect over the last 40 years.

In addition, we must question the Board's allegations that the agreements and accreditation standards at issue are anticompetitive. In 1982, for example, an average of five new agency locations were opened every day. Further, it should not be overlooked that airlines continue to retail their own tickets and negotiate bulk and reduced fares with a vast array of travel industry components including tour operators, cruise lines, hotels and resorts—rendering the very term "exclusivity" a misnomer. This will not change if Judge Yoder's decision is implemented.

In the final analysis, the intrinsic strength of the current system is the outgrowth of a high level of competition—the definitive foundation of a free market—united with minimal standards which guarantee objective, high quality service to the consumer.

It is for these reasons that the Travel and Tourism Government Affairs Council supports S. 764 "The Air Traveler's Security Act of 1983." Thank you.

Senator KASSEBAUM. Maybe both of you can answer, although I think you are comming at it from different sides, but do you see—what innovations would you see that could come about with the CAB's decision that would be foreclosed by S. 764?

Mr. LINEN. Madam Chairman, I would like to answer that. From our perspective it is a very simple issue. You have deregulated the airline industry yet S. 764 if passed would create a situation in which a travel agent, the major distribution arm of the airlines, would have an unequal opportunity to compete in its methods of distribution and who it can distribute to than the airlines.

For example, a travel agent may wish to put a ticketing machine on the premises of a commercial account that it serves. Under S. 764 it would be prohibited from doing that, and we think that is an unequal situation and also it leads to a stifling of the innovation process in which agents as well as airlines have the opportunity to develop alternative methods of distribution using cable or technology or anything else that we have heard talked about here this morning.

Senator KASSEBAUM. You mentioned putting a machine on the premise of an agency, but this has been one of the questions, has it not, with Judge Yoder's decision regarding a nonagent retailer? Exactly what would be meant by that? So that they might not be foreclosed is my understanding.

Mr. LINEN. Well, right now a nonagent retailer might be a Ticketron who has experimented in this, and under the current situation Ticketron can only sell point-to-point tickets under an arrangement with a specific carrier. If two carriers got together I suppose they could agree and allow it to interline.

Under the Yoder decision that would be precluded, and I would like to have the right without an airline telling me yes or no to distribute tickets on behalf of a customer at that customer's location.

Senator KASSEBAUM. What effect do you think this has, and obviously again both of you will have different points of view, on the stability that has come from interlining as far as the ability to handle ticket sales and baggage? Do you see if antitrust immunity is lifted in this particular aspect, disarray occurring and that there will not be a continuation of interlining where it works well?

Mr. GAFFIGAN. I think there is a general concern amongst many in the industry that at the moment the traveler's complete mobility, people being able to go through one agent or airline to do what they have to in all travel aspects is covered. That right is protected.

What happens in the future, and I am not an antitrust lawyer, I have sat through and I must commend you on a very interesting dialog but the general feeling is that the situation as it exists at the moment provides our consumer, the person that is involved in traveling making us the second largest business, they are protected by the current system. They have confidence in the system and equally important the members of the industry feel that the system has worked.

Senator KASSEBAUM. Do you see a lot of lawsuits developing as was expressed?

Mr. GAFFIGAN. Not being an antitrust lawyer I do not want to get into that.

Mr. LINEN. My comment, Madam Chairman, would be we do not see any reason why the interlining agreements for ticketing or baggage should go away or would go away with removal of antitrust immunity. In fact, the consumer ultimately in my view is the decider in what happens out there in any industry, and if I am traveling from New York, to Chicago, to San Franciso and I have to go on two carriers, I am going to pick two carriers that allow me to write one ticket and will accept each other's tickets and will transfer my baggage in any kind of an open market environment.

It seems to me that the service that the customer wants will be provided by those successful purveyors of value and service which ultimately would be the successful carriers.

Senator KASSEBAUM. Any other comments? Thank you very much. We appreciate your testimony.

The last panel, Mr. Brown, Mr. Hitchcock, and Ms. Macchia, it is a pleasure to welcome you all.

Ms. Macchia, why do you not go first as president, National Passenger Traffic Association. I appreciate your being with us.

STATEMENTS OF ARLENE MACCHIA, PRESIDENT, NATIONAL PASSENGER TRAFFIC ASSOCIATION, INC., ACCOMPANIED BY JOHN BACON, TENNECO; TIM GAINES, LOCKHEED CORPORATION, AND RICHARD STEIN, COUNSEL; CORNISH HITCHCOCK, AVIATION CONSUMER ACTION PROJECT; AND WILLARD BROWN, VICE PRESIDENT, TRAVEL AGENCY SERVICES, AMERICAN AUTOMOBILE ASSOCIATION

Ms. MACCHIA. Good morning. Madam Chairman and members of the subcommittee, I am Arlene Macchia, president of the National Passenger Traffic Association and manager of Business Travel in Allied Corp., at Morristown, N.J. for 29 years.

I am honored to appear before you to discuss the competitive marketing case of airline tickets. Accompanying me today is John Bacon, of Tenneco, from Houston, Tex.; Jim Gaines, of Lockheed Corp., from Burbank, Calif.; and Richard Stein, counsel to NPTA.

I have a longer written statement that I have submitted for the record. NPTA is an association of the in-house business travel departments more commonly known as BTD's of more than 600 corporations, hospitals, educational institutions, and Government agencies which operate their own in-house business travel departments ranging from the Boy Scouts of America, and the Muscular Dystrophy Association, to Hughes Aircraft, and the Washington Post. NPTA has 20 regional affiliates which have another 815 members.

NPTA strongly opposes S. 764. This bill would stifle competition in the sale of airline tickets and create permanent antitrust immunity to the travel agents.

Before I address some of the arguments made by advocates of S. 764, I would like to talk for a minute about business travel departments. Businesses, including small businesses and others who engage in business travel, have basically three options in deciding how to manage their travel: the in-house department that does all of its own travel arrangements directly with the airlines; the inplant department conducts its own business travel in a partnership with an individual travel agent; and the full-service department that conducts all its work in a travel agency.

With the inhouse method, the BTD does all the work, but the department receives no compensation for cost incurred on behalf of the Department.

In the inplant situation, travel agents receive a 3-percent commission from the airlines, of which the agency receives 1 percent, primarily for allowing the BTD to use its plate. Usually the operation is run entirely by the BTD, with the inplant agency doing little or no work.

Finally, under a full-service arrangement a travel agency receives the full 10-percent commission on the organization's business, the company receives nothing.

Despite the costs associated with running the BTD, many associations continue to operate them because they provide a centralized private economical system of arranging travel. BTD's provide a service similar to that which travel agencies provide. In fact, BTD's are as well equipped, perhaps better equipped in several respects, to providing ticketing service for the airlines:

First, BTD's currently have the same professional capabilities as travel agencies, including computerized equipment, ticket stock, interlining authorities, training and professional relationships with the airlines.

Second, the BTD's have a clear motivation to identify the best travel arrangements at the lowest cost. Their recommendations would not be influenced by special benefits such as free trips and overrides or commissions based upon the ticket price.

Third, where inplants are used BTD's receive compensation for handling the organization's business travel, using an agent's plate, becoming in effect an extension of the travel agency. Nearly 600 ATC-approved inplant BTD's currently in operation are convincing evidence that the airlines have recognized the value and competency of BTD's.

With your permission, let me now turn the committee's attention to the arguments of those who would reject the CAB decision. It is unfortunate that discussions of the Board's decisions have been clouded by a number of overstated charges suggesting that competition in marketing would lead to the wholesale collapse of the air transportation system, and that as a result consumers, airlines, and the small travel agent will suffer.

These claims are false and I would like to take a few moments to tell you why. To begin with, if we were to believe that efficiency of air transportation would be undermined NPTA would not be opposing S. 764. Business travelers make up more than 50 percent of all air travelers and rely more than any single group on efficient and dependable air transportation.

If this system were to fall apart tomorrow, become more costly or less efficient, we would be the ones to suffer the most. We obviously do not believe this will happen. The CAB did not believe it either.

It has been said that competition in ticket distribution would drive thousands of small travel agents out of business. There is no basis for this fact or this claim. Travel agents provide a valuable service. As long as agents serve the airlines and their clients effectively, they will remain a dominant force in the market.

In fact, compensation losses to the small travel agency due to the entry of the BTD's or other nonconference marketeers are likely to be minimal. To begin with, any impact on the market is likely to be on the larger agencies.

Although travel agencies originally were developed to handle promotional travel only, almost 20 percent handle corporate travel exclusively. Most medium and small corporations do not have BTD's because it is an expense that they cannot afford. They will continue to use their local travel agencies.

In fact, only 11 large travel agencies specializing in inplant control over one-half of the business travel inplants. The small agencies will not even be affected.

It has been said that airlines will abandon the common accreditation system if competition is allowed. On the one hand they argue that common accreditation is both effective and desirable to the airlines, agents, and customers, but at the same time they suggest the system is so fragile that it will collapse with the introduction of competition and that the air carriers will be willing to abandon it.

This is both inconsistent and illogical. Air carriers have every incentive to maintain high standards. Ticket distribution is vital to their business. They have every reason to continue to deal with the system.

It has also been suggested that without antitrust immunity carriers would abandon their practice of using interlining agreements for travel involving more than one airline, thereby forcing travelers into the grim task of carrying their luggage from one airline to another.

This is ridiculous. Carriers would certainly continue to make such cooperative arrangements in a competitive environment. In fact, the CAB could only find one airline that said it would seriously consider withdrawing from the conference if antitrust immunity were removed. Our written statement also contains a direct quote from the airline's executive on this subject.

Opposition to the CAB decision has also said that airline tickets would be sold by persons who would not know what they were doing—gas station attendants, bartenders, or the butcher, baker, and candlestick maker.

This fear is completely unfounded. Ticket stock is like a blank check. It would be foolhardy to hand it over to an incompetent distributor. Airlines will insist on high standards, even for their nonconference marketeers.

One final claim that S. 764 supporters have made is that corporations do not need commissions because they have already received large discounts from the airlines. In reality, corporate discounts are nonexistent, and it will remain so as long as antitrust immunity and the threat of travel agent boycott exists.

In conclusion, Madam Chairman, this bill, which is barely two pages long, has enormous ramifications for the airline ticket marketing system in this country. It turns back the clock on everything that the CAB and the Congress has done to encourage competition in the distribution of airline tickets.

Indeed, S. 764 would take us back to exclusive access, antitrust protection, and a restrictive ticketing system. The CAB said that the time has come to give the airlines the freedom to market tickets as they see fit, without the intervening hand of the Government. The evidence on the record supports that decision.

S. 764 says we shall not only give travel agents back their monopoly, but we shall enact a law to make antitrust permanent. The National Passenger Traffic Association urges the Congress to reject S. 764, which would reverse the CAB decision and deny the public the many benefits of competition. Let us allow the free market to work and then the customers and airlines can obtain the best value at the lowest cost.

Thank you. We would be happy to answer any questions.

[The statement follows:]

STATEMENT OF ARLENE MACCHIA, PRESIDENT, NATIONAL PASSENGER TRAFFIC ASSOCIATION

Madam Chairman and Members of the Subcommittee, I am honored to have the opportunity to appear before you to discuss the competitive marketing of airline tickets. As President of the National Passenger Traffic Association (NPTA), I want to express our strong opposition to S. 764, a bill which would stifle competition in the sale of airline tickets and confer permanent antitrust immunity to travel agents.

NPTA is an association of the in-house business travel departments, more commonly known as BTD's, of more than 600 corporations, hospitals, educational institutions and government agencies ranging from Boy Scouts of America and the Muscular Dystrophy Association to Hughes Aircraft and the Washington Post. NPTA also has 20 regional affiliates, which have another 850 corporate members.

Since business travelers are responsible for more than $19 billion in business travel annually—more than half of all air travel—we are naturally interested in promoting the most efficient and responsive system of marketing airline tickets. As advocates of competition in this area, we have been involved with the Civil Aeronautics Board's *Competitive Marketing Investigation* since its inception. Recent efforts to overturn the CAB's decision are of great concern to us.

THE CAB DECISION AND COMPETITIVE MARKETING

For over forty years the airline industry was one of the most heavily regulated businesses in our country. The federal government, through the Civil Aeronautics Board (CAB), determined where a carrier could fly and how much it could charge. It also approved agreements whereby airlines were restricted to appointing only travel agents to distribute their tickets. In 1938, when the statute creating the CAB was passed, air transportation, including ticketing, was an emerging industry and benefited from government involvement.

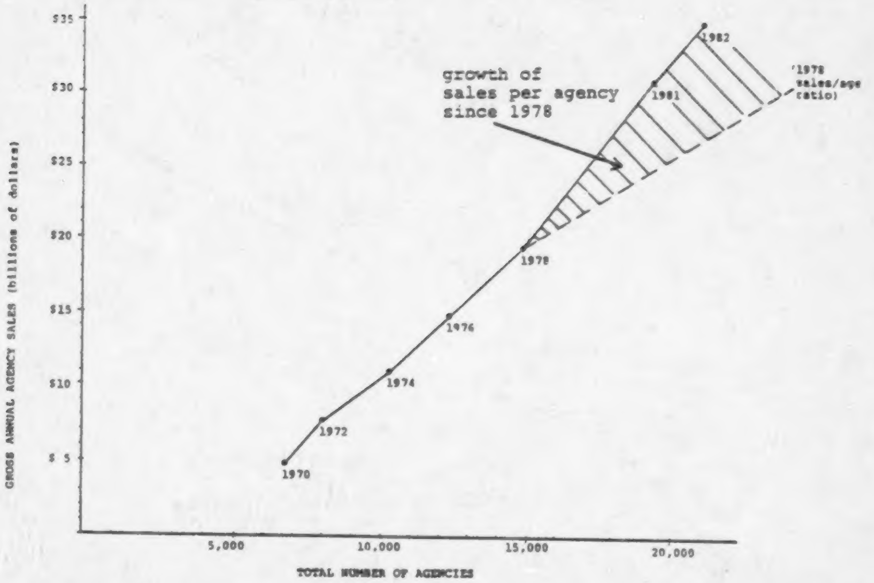
Today, air transportation is much different. It is a mature industry which requires little oversight or protection from the federal government. Five years ago, the Congress recognized this fact with the passage of the Airline Deregulation Act of 1978. With that landmark legislation, Congress concluded that, for the benefit of all concerned, particularly consumers, it was time to turn the management of airlines over to the same competitive forces that had worked so well in other sectors of our economy.

As a part of that Congressional mandate to deregulate the airline industry, the CAB initiated the *Competitive Marketing Investigation* to determine how competition could best be introduced into the airline ticket marketing system. (CAB 79-9-64). The system they found was in many ways distorted, inefficient and lacking in meaningful incentives for innovation and competition. Simply put, the existing system did not exhibit all the signs one would expect from a competitive market. Several facts about the system at that time buttress this view.

While many airlines face tough economic times, some even going bankrupt, the number of travel agents continues to rise—from only 6700 in 1970 to over 22,000 in 1983. Although some travel agents claim their industry has been hurt by airline "fare wars", their total annual dollar volume has grown six-fold during the same period to $31 billion.

Sales per agency also continue to grow, despite increasing numbers of travel agencies. As Chart 1 on the following page shows, the ratio of number of agencies to annual volume has increased since deregulation in 1978, indicating that average volume per agency continues to outstrip the total number of agents.

GROWTH IN SALES VS. GROWTH IN AGENCIES CHART 1



Despite increasing travel agency numbers, sales per agency continues to grow. On the average, an agency's annual sales have not been hurt by these new "competitors." In fact, since deregulation (1978) average agency sales have grown faster per year than in the previous six years.

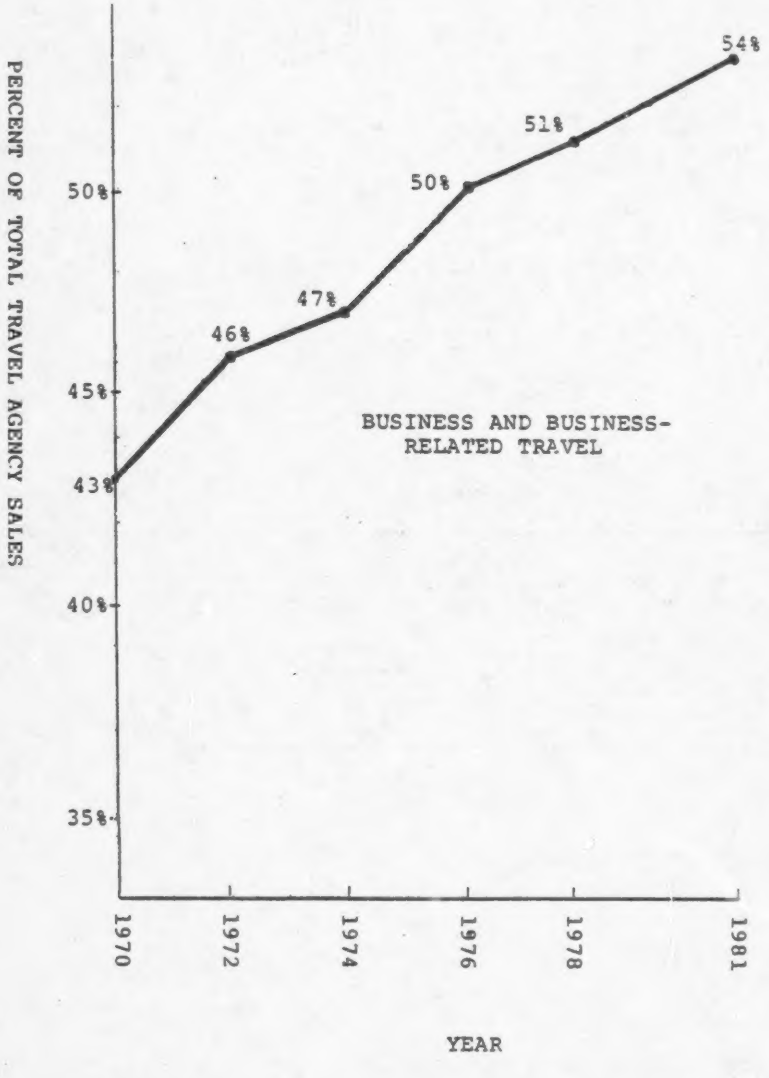
YEAR	TOTAL NUMBER OF AGENTS	GROSS AGENCY SALES	AVERAGE VOLUME PER AGENCY
1970	6,700	$5 billion	$ 746,000
1972	8,000	$7.7 billion	$ 963,000
1974	10,260	$11 billion	$1,072,000
1976	12,240	$14.9 billion	$1,217,000
1978	14,804	$19.4 billion	$1,310,000
1981	19,203	$31 billion	$1,614,000
1982*	21,000	$34.6 billion	$1,647,600

*estimated

source: Travel Weekly's Louis Harris Study Issue, May 1982

CHART 2

GROWTH OF
NON-DISCRETIONARY SALES
AS PERCENT OF TOTAL TRAVEL AGENT SALES



source: Travel Weekly Louis Harris Study Issue, May 1982

The allocation of airline ticketing business has also changed. What originally was a market dominated by the providers of air transportation—airlines—has become a market dominated by the agents of the airlines. Since 1978 alone, travel agents share of the airline ticketing market has ballooned from 38% to over 60% domestically and 80% internationally. Although travel agents originally were developed to handle "promotional" travel only, almost 20% handle exclusively corporate travel, and almost 90% do some corporate travel, the vast majority of which is rarely ever "promotional." Today, business and business related travel accounts for 54% of all agency sales. (See Chart 2).

With such a large number of travel agents, one might expect that competition among them exists. Yet, there apparently is little or no price competition. Travel agents all receive essentially the same commissions from the airlines.

Since 1978 agents sales commission rates have risen steadily from seven percent to nearly ten percent today. And these increases have been disproportionately high compared to other airline operating costs, especially in view of the apparently tenuous ability for airlines such as Braniff, Continental and Eastern to maintain solvency. Commission payments to agents have more than doubled from 2.8 percent of airline operating expenses in 1970 to 6.2 percent in 1982. Between 1981 and 1982 alone the total commissions paid out by airlines jumped almost nine percent from $1.95 billion to more than $2.2 billion while overall operating costs increased a little over one percent. Some individual carriers were hit even harder. American Airlines saw its commission payments go up 16 percent (to almost $244 million) while United Airlines paid out 12.6 percent more in commissions in 1982 than in 1981, an increase totalling over $295 million.

Of course, escalating commission levels that increase airline costs are ultimately built into ticket prices for all consumers.

These facts raise an important question: Since the upward spiral of commission payments and travel agents' increasing market share are obviously costing the airlines and consumers, why have airlines not acted to reduce commission levels? And why are air carriers not offering corporate customers and other frequent flyers bulk discounts as the CAB said they could in 1981? The reason is simple but disturbing: air carriers fear travel agent reprisal.

Although most carriers will not discuss it publicly, travel agents, by virtue of their market dominance and the absence of meaningful competition, have the ability to influence airline marketing decisions and dissuade airlines from taking actions adverse to the interests of agents. The most common practice is to "plate away" from carriers that step out of line.

The history of the conference program since the CAB eliminated fixed commissions is filled with examples.

In February of 1980, the CAB withdrew the seven percent fixed commission and ordered airlines to make individual plans to compensate agents. United Airlines was the first to respond coming in with a proposal to pay a flat $8.50 per ticket transaction. But that proposal generated so much opposition among agents that United quickly withdrew it and replaced it with a sliding scale of payments ranging from $7.50 to $37.50 depending on the distance flown.

Despite its policy reversal United was not left unscathed by its innovation. In March, the airline showed a 14 percent drop in traffic. At the time, Newsweek magazine reported one San Francisco agent saying that she redirected 30 percent of her United business to other airlines.

A travel agency president in Florida wrote an editorial in Travel Trade News Edition which warned—

"* * * If United does not revise its $8.50 per coupon fee I will not sell any United ticket or any tour using United as the carrier. I am prepared to return the United plate if the airline does not maintain its present commission percentage policy." [1]

Another agent in Los Angeles confessed his reaction. He is quoted in the same publication as saying—

"First thing I did was to request my office staff to lay low in selling United Airline tickets unless the client particularly wanted United routing. Otherwise they were to route each client to other carriers."

Even the president of a large travel agent organization said, when he heard about American Airlines' recent proposal to drop commissions from 10 to 9 percent, that his agency would have to "look very carefully at its American Airlines sales and decide whether or not it should continue with that kind of productivity." [2]

---

[1] Travel Trade News Edition, April 28, 1980, p. 67.

[2] Travel Weekly, August 18, 1983, p. 101.

Statements on the record before Judge Yoder provide ample evidence that agents not only have the power to influence the airlines but are willing to do so when necessary. Following a decision to lower commissions, James Palm, Director of Sales Development for Republic Airlines, noticed a sudden decline in traffic and made this observation on the record,

"Our feedback from our district sales people indicated that we were losing groups . . . on a couple of occasions we were informed that individual travel agents were instructing their people to use us only when they had to, and things of that nature." [3]

Last year Frontier Airlines attempted to lower its commission rate from ten percent to nine percent. It was "plated away" from so heavily that it was quickly forced to return its commission to the original level.

Other airlines spoke directly about commissions in testimony before Judge Yoder. Randall Malin, Senior Vice President of Marketing for U.S. Air, responded to cross examination in the following manner:

Q. "Now with respect to your decision to raise the commission level from nine to ten percent, is it fair to say that as a part of your decision making process you considered the risk that you might incur of having traffic diverted to other carriers in the event you did not raise the commission?"

A. "Yes, I did."

Q. "So was that the principal factor in determining to raise the commission level?"

A. "Yes, it was."

Roger Nesbit, Director of Passenger Sales Accounting, Continental Airlines, responded to a similar question:

Q. "With respect to the recent increase in commissions that we talked about from nine percent to ten percent, were you concerned about diversion of Continental's sales to other air carriers in the event that you would not have increased your commission level?"

A. "Yes, that would definitely be a consideration."

Q. "Would you agree that it was at least the risk of diversion that motivated in part the change in commission levels, from nine percent to ten percent?"

A. "In part, yes."

Q. "If not actual diversion?"

A. "Yes."

Although these examples by themselves raise serious questions about the existing ticket distribution system, it was the basic structure of the system—particularly travel agent exclusivity and antitrust immunity—that the CAB found fundamentally objectionable in its 1982 decision. I would now like to turn the committees attention briefly to that decision.

The Board found that the exclusivity provisions which had been built into the carrier conference agreements had the practical effect of making travel agents the sole distributors of airline tickets.

For many years, conference agreements between the airlines and travel agents have contained "exclusivity clauses" requiring member airlines to market their tickets exclusively through member travel agents. Because virtually all major airlines are members of these conferences, the exclusivity clauses effectively prevent the marketing of tickets except through conference-accredited agents. To this extent, airline tickets are marketed through a restricted distribution system with travel agents possessing a monopoly on access to that system.

The Board found that these exclusivity clauses substantially reduced competition and were unnecessary for the continuation of the conference system. At the same time it concluded that continued protection from the antitrust laws was neither necessary nor desirable. Immunity from the antitrust laws allows airlines and agents to enter into agreements which otherwise could not legally have been reached. As a result, the government is placed in the position of indefinitely overseeing those agreements and determining, on a case-by-case basis, which are the most desirable for consumers.

While the Board favored competition in ticket marketing and disapproved both agent exclusivity and antitrust immunity it was careful not to disturb the essential elements of the existing system of "Common accreditation" which was generally favored by all parties, including NPTA. Only those provisions which unnecessarily reduced competition and thereby curtailed the benefits of the program were disapproved.

---

[3] 52 TR. 136, CAB Docket 36595.

The Board was also careful in its evalaution of the existing standards for accreditation, leaving the current requirements nearly intact. All interested parties, including NPTA, clearly recognize the value of meaningful standards which reasonably relate to sound business practices. The CAB noted, however, and NPTA agrees, that some of the standards which it approved may still unnecessarily restrict competition and should be re-evaluated during the generous two year transition period before antitrust immunity is withdrawn.

Accreditation, then, has not been discarded. Reasonable standards should and will continue to exist for conference agents. It would also be perfectly reasonable for airlines to have minimum qualifications for non-conference marketers it may choose to appoint.

PROBLEMS WITH S. 764

As you know, Mr. Chairman, S. 764 orders the CAB to vacate its 1982 decision in favor of competitive marketing and adopt instead an earlier finding by administrative Law Judge Ronnie Yoder. In NPTA's view, this would be a serious mistake. The Yoder opinion not only continues the travel agent monopoly on access to the ticketing market but it perpetuates antitrust protection which would negate everything the CAB tried to do in its decision.

The Yoder decision is plainly at odds with the policy set by Congress in the Airline Deregulation Act of 1978. It is fundamentally anti-competitive in its retention of travel agent exclusivity and antitrust immunity. Its premises and most of its substantive provisions were rejected by the CAB and should not be embraced by Congress now.

The Yoder opinion flatly prohibits airlines from appointing non-conference-accredited persons as their "agents." It thus endorses travel "agent exclusivity" and preserves agents' monopoly on access to the conference system. Moreover, the definition of "agent" adopted by Yoder represents a departure from traditional legal construction of the term. Rather than recognizing that an agent is any "person or firm empowered to act in behalf of another," Yoder narrowly defines "agents" as only those organizations which are accredited for distribution by ATC or IATA.

The Yoder decision does indicate a disapproval of "marketing exclusivity," meaning that an airline, theoretically, could venture outside the conference system to utilize other distribution outlets. Yet, the opinion contains several provisions which would stifle any innovative efforts to use non-conference marketers.

Most importantly, the opportunity for carriers to operate within the protected environment of the conference—insulated from prosecution for anti-competitive activities—creates a major deterrent for carriers to venture outside the system. Collusive efforts between carrier and agent are still possible. The entry of actors who could reduce these collusive powers is precluded, because the agreements are immune from legal recourse.

The removal of "marketing exclusivity" by itself is thus an empty promise which would have little or no pro-competitive effects.

S. 764, by adopting the Yoder decision, would prevent new and more efficient distribution systems and discourage competition among retailers who might offer lower commissions and different types of services. Business travel departments, discount ticket offices, part-time distribution outlets, phone-only distribution firms, as well as many banks, credit card companies and firms yet to be identified would be effectively excluded. No incentives would exist for innovation and efficiency, even for travel agents themselves.

I can imagine a day when I can call up airline reservation systems on my interactive, two-way cable television screen and make a reservation directly with the airline, perhaps at a discount since no commission would be paid. This would save consumers and airlines money. I can also imagine a situation similar to that which occurred in the securities industry following its deregulation in 1975. Discount brokerage houses sprang up offering to handle simple transactions for those customers who knew exactly which stocks they wanted to buy. In some cases, commissions on those services are now about half what they were prior to deregulation.

Not only are new distributors excluded under Yoder, but existing travel agents are denied the flexibility to respond to changes in ticketing service demands that the CAB's decision would allow.

Exclusivity also forces airlines to pay full-service commissions to agents regardless of the nature or level of the service they provide. Airlines pay the same 10 percent commission on every transaction regardless of whether it is a ticket to London, England or New London, Connecticut, or whether the agent simply wrote a ticket or engaged in extensive travel planning.

The Board's decision allows for the "unbundling" of travel services, and the opportunity to make commissions more reasonably related to the nature and level of service provided.

BUSINESS TRAVEL DEPARTMENTS

Before I address some of the arguments made by proponents of S. 764, I would like to talk specifically for a moment about business travel departments—how they operate, their relationship with air carriers and their functions as compared to travel agents.

Corporations, hospitals, educational institutions and other organizations which engage in business travel have basically three options in deciding how to manage their travel: the "in-house" option, where an organization does all its own travel and probably deals directly with the airlines; the "inplant" option, where the organization conducts its own business travel in "partnership" with an independent travel agency; and the "full service" option, where the organization contracts out all its work to a travel agency.

In each case the compensation is different. With the completely in-house method the BTD does all the work, obviating the need for a travel agent, but it recieves no compensation from the airlines. Although BTD's are fully compensated by other travel entities such as hotels and car rental agencies, in the inplant situation, travel agents receive about a three percent commission from the airlines of which a negotiated amount (usually about two percent) is passed on to the BTD. The inplant travel agency receives the remaining one percent primarily for allowing the BTD to use its plate. Usually the operation is run entirely by the BTD with its own ticket terminal and booking operation—the inplant agency does little or no work. Finally, under a full service arrangement, a travel agency receives the full 10 percent commission on the organization's business. The company receives nothing.

Most BTD's provide a service remarkably similar to that which travel agents provide. In fact, BTD's are at least as well equipped, perhaps better equipped, in several respects to fulfill the distribution and sales function for the business traveler and provide ticketing services to airlines.

First, most BTD's currently have the same professional competence and capabilities as travel agents, including computerized equipment, ticket stock, interlining authority, training and good relationships with the airlines.

Second, unlike travel agents, BTD's have a clear motivation to identify the best air travel arrangements at the lowest cost. Their recommendations would not be influenced by the special benefits, such as free trips and sales overrides, now offered to individual travel agents.

Third, inplant BTD's receive up to three percent commission by handling all of the orgainizations business travel, using an agent's plate, becoming in effect an extension or functional equivalent of the travel agency. The nearly 600 inplant BTD's currently in operation are convincing evidence that airlines have recognized the value and competence of BTD's in the provision of ticketing services.

Let me now turn the Committee's attention to the arguments of those who would reject the CAB decision.

ARGUMENTS OF THE OPPONENTS OF THE CAB DECISION: A CLOSER LOOK

It is unfortunate that public discussion of the Board's decision has been clouded by a number of unsubstantiated and overstated charges suggesting in various ways that competition in marketing will lead to the wholesale collapse of the air transport system as we know it, and that as a result consumers, airlines and, of course, travel agents will suffer. These assertions are false and I would like to take a few moments to tell you why.

To begin with, if we believed the efficiency of air transportation would be undermined, NPTA would not be opposing S. 764. Business travelers rely more than any single group on efficient and dependable air transportation. If the system were to fall apart tomorrow, become more costly or less efficient, we would be the ones to suffer most. We obviously don't believe this will happen. The CAB did not believe it would happen either.

It has been asserted that competition in ticket distribution will drive hundreds of travel agents out of business. There is no basis in fact for this claim.

Travel agents provide a valuable service—to airlines, to discretionary travelers, and to the majority of the business community. As long as agents serve as conciencious representatives of the airline principals and provide competent advice to their clients, they will remain a dominant force in ticket marketing. And, in fact, the

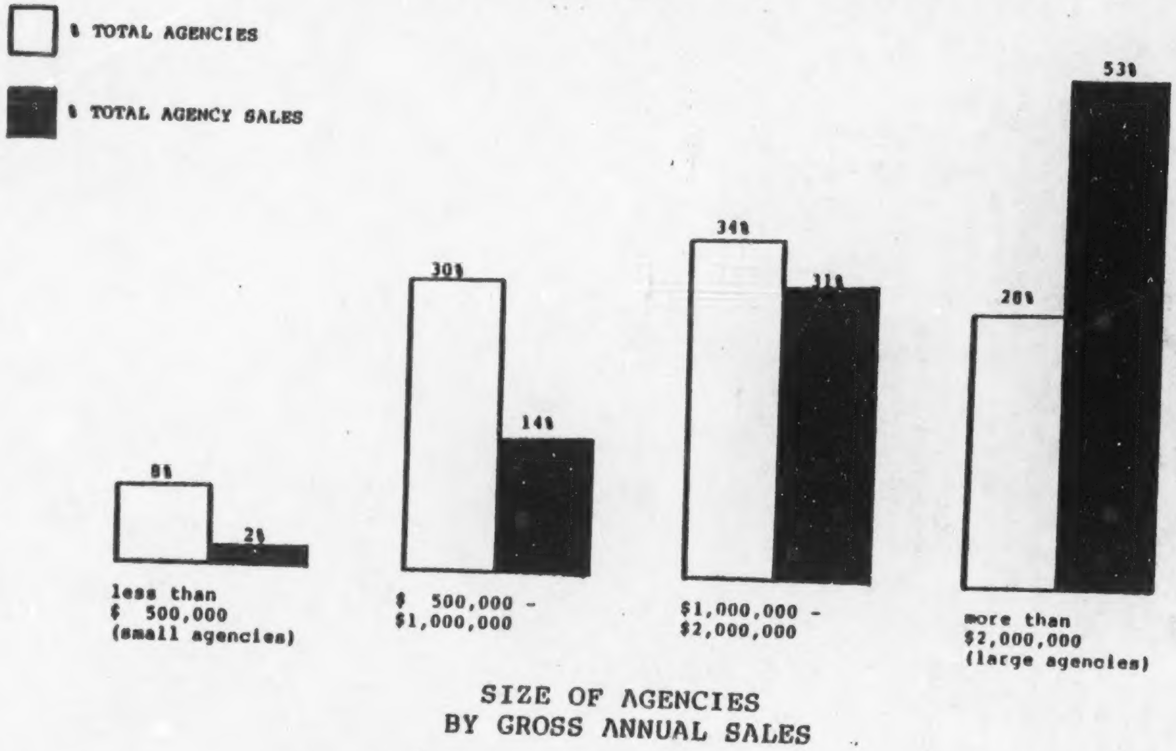
Board's decision does not force them to change. It simply allows airlines marketing options which have been denied them for nearly 40 years.

Empirical data also belies the claims that agents will be put out of business. In fact, revenue losses from travel agents due to the participation of BTD's or other non-conference marketers are likely to be minimal.

To begin with, any impact on the market is likely to be on the largest travel agencies. In 1978, 18 percent of travel agents that handled corporate accounts dealt exclusively with large corporations. Most medium and small corporations probably would not establish BTD's because it would not be cost effective. The larger agencies tend to deal predominantly with larger clients meaning that competition from BTD's would primarily affect that 18 percent of agencies that are large themselves. The small agencies will probably not be affected.

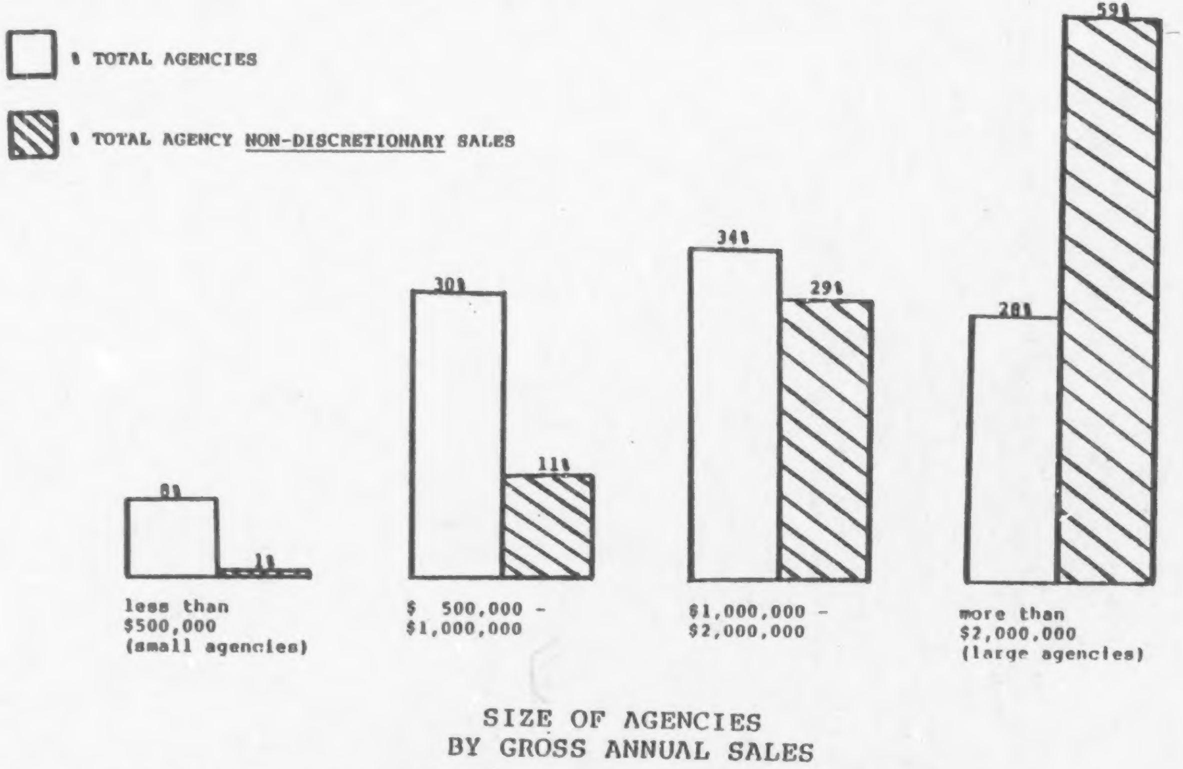
The more substantial threat to the smallest agencies probably comes from the large agencies which control a sizeable and growing share of the market. Only 28 percent of the large agencies are handling over 53 percent of all agency sales and nearly 60 percent of total corporate sales. (See Charts 3 and 4 on following pages.) In fact, one travel agency was responsible for 105 corporations.

CHART 3 — 1981
AGENT-HANDLED SALES CONCENTRATION BY AGENCY SIZE



source: Travel Weekly's Louis Harris Study Issue, May 1982

CHART 4 —1981
CONCENTRATION OF AGENT-HANDLED NON-DISCRETIONARY SALES



source: Travel Weekly's Louis Harris Study Issue, May 1982

BEST COPY AVAILABLE

The American Society of Travel Agents' (ASTA) own economic testimony before the CAB estimated that BTD sales handled would increase by only $250 million.[4] As a fraction of all $19 billion in business travel, that represents only about a 1.3 percent shift. And it assumes that all the lost business would come from sales previously made by agents. Actually, the bulk of that business is likely to come from the largest travel agencies. Hence, the assertion that small travel agencies will be displaced by BTD's is factually unfounded.

Even taking into account the impact of all potential new distributors, the ASTA witness predicted that travel agents total market share would only drop from 53 percent to 51 percent—a two percent drop in agency sales.

Recent attempts to dispel the significance of these figures should be viewed with skepticism since the often are premised on the assumption that both the common accreditation system and reasonable competency requirement will collapse—an assertion for which no compelling evidence has been brought to bear.

Some proponents of exclusivity have taken the position that airlines will abandon the common accreditation system and other arrangements in which they now participate. On the one hand, they argue that these arrangements are both efficient and economical to airlines, agents and customers. But at the same time they suggest that the system is so fragile that it will surely collapse with the introduction of competition. This is sheer folly. Air carriers have every incentive to maintain high standards. Reliable ticket distribution is vital to their business. Common accreditation is also an effective means of marketing their tickets. They have every reason to continue to participate.

In fact, the CAB could only find one airline that said it would seriously consider withdrawing from the conference if antitrust immunity were removed.

It has also been suggested that under competition carriers would abandon their practice of using interline agreements for travel involving more than one airline, thereby forcing travelers into the grim task of carrying their luggage from one airline to another. This is ridiculous. Interline agreements permit one airline to write air transportation on other airlines that are parties to the agreement. When one carrier writes a ticket involving another, the first carrier is responsible for any loss. Carriers are not at any greater risk under the CAB's decision than they already were. The CAB explicitly found that exclusivity is not necessary for interline agreements to continue. Carriers will certainly continue to make such cooperative arrangements in a competitive environment because the convenience and economic incentives of the agreements will continue to exist.

Even airlines themselves have reached these conclusions. In a recent interview in Travel Weekly, John Zeeman, Senior Vice President of Marketing for United Airlines, spoke frankly about the removal of exclusivity and antitrust immunity and its effect on airlines participation in the carrier conference and interlining. When asked if carriers would abandon these practices Zeeman replied:

"There may be some that would, I doubt it. I think that from our evaluation of that system it will pass any screen. And I think most of the carriers will come to the same conclusion and they will realize that it is a very effective way for both the airlines and the agencies to conduct their business. I don't see that going away with or without antitrust immunity.

"The same thing I would say of interlining in terms of bags. The basic way that the airline industry conducts its business, I think, would be retained with or without antitrust immunity."[5]

Opponents of the CAB decision have also suggested that airline tickets will be sold by persons who will not know what they are doing—gas station attendants, bartenders or the "butcher, baker and candlestick maker." This is preposterous. There is absolutely no reason why airlines would ever allow unqualified persons to handle their tickets. Ticket stock is like a blank check. It would be foolhardly to hand it over to an incompetent distributor. Airlines have a legal responsibility to provide air transportation or refund the ticket. They have strict requirements for ensuring the safety of ticket stock—vaults for safes, precise accounting standards, etc.—which all distributors must fulfill. And, as I explained, carriers are financially responsible for any tickets that are written which connect to another carrier. If nothing else, airlines can ill afford to have its customers suffer inconvenience or less at the hands of incompetent ticket distributors. Airlines are likely to insist on high standards even for its non-conference marketers.

Finally, to further muddle the question of whether airlines should be permitted to appoint non-conference marketers, it has been suggested that BTD's are really purchasers of air transportation and therefore should not be compensated by the airlines. From the outset, one would think that compensation is something that airlines are capable of deciding on their own. After all, it is the airlines' product that is being sold. They should have freedom to appoint and remunerate whomever they choose for marketing their product. As I have explained, travel agents and airlines have already recognized, through the use of inplants, that BTD's are in effect the functional equivalent of travel agents. They interact with airline computers. They make reservations. They have their own ticket stock and already write tickets. And, they interline. From the perspective of the airline, BTD's offer the same sales and distribution function as a travel agent. The only difference is that the travel agent is paid by the airline for what it does. The BTD is not.

---

[4] Exhibit ASTA-20, p. 111, CAB Docket 36595. (See, Appendix 1 infra)

[5] *Travel Weekly*, May 16, 1983, p. 8.

To bolster the claim that BTD's should be disenfranchised some proponents of S. 764 have suggested that the primary objective of BTD's is to produce revenue for their affiliated organizations. Certainly proponents of H.R. 2053 are not suggesting that existing travel agents are not in business to make money. BTD's are primarily interested in reducing their costs while serving their clientele, but motivations are irrelevant to this debate. BTD's are not asking for special treatment. They simply want the opportunity to compete fairly in the provision of travel arrangement services to airlines and be compensated for those services.

A similar argument has been made that BTD's are attempting to force airlines to provide them with discounts. This is patently incorrect, and those who subscribe to this belief have confused the terms "discount" and "commission."

A discount is a reduction in product price, usually for customers who make bulk purchases. In this case the product is air transportation. Any purchaser of air transportation could be eligible for a discount whether it is a company, the federal government, or the participants of a Boy Scout convention. The existence or non-existence of a BTD is irrelevant to the granting of discounts by airlines.

By contrast, a commission is a fee paid to an individual or organization for the provision of a service—in this case the selling of an airline ticket that the airline would otherwise have to sell itself. Only those that provide the service are eligible for the commission.

If a BTD provides a service to an airline—in fact the same service that travel agents provide—it should be eligible for compensation for its work. This does not seem to be an unreasonable proposition, especially when a BTD may be willing to provide the same service for less compensation.

Thus, paying BTD's for their service to airlines is no different than the commission paid to travel agents for the same service, and it is completely unrelated to the granting of bulk discounts to purchasers of air transportation.

The CAB decision also noted that it is acceptable business practice for a firm to profit from sales to itself. Not only is there no legal prohibition to such a practice but it is a well accepted economic principle in other sectors of our economy. The CAB has already addressed this concept in an analogous area. In the context of air freight transportation the Board approved the airline practice of compensating individuals not affiliated with the carrier for preparing cargo for shipment. This was true even where the user and the preparing agent were one in the same entity.

CONCLUSION

In conclusion, Mr. Chairman, this bill, which is barely two pages long, has enormous implications for the airline ticket marketing system in this country. It turns back the clock on everything the CAB has done to carry out the mandate of Congress to deregulate the airline industry. Indeed, it brings us back to a time of exclusive access, antitrust protection, and all the distortions of a protected market.

The CAB said that the time has come to eliminate travel agent exclusivity and give airlines the freedom to market airline tickets as they see fit without the intervening hand of government. The evidence on the record supports this decision.

S. 764 says, no, we should not only give travel agents back their access monopoly but we should make it permanent.

The National Passenger Traffic Association urges the Congress to reject H.R. 2053, which would reverse the CAB decision and deny the public the many benefits of competition. Let us allow the free market to work so that customers and airlines can obtain the best value at the lowest cost.

Thank you very much.

This concludes my prepared remarks.

APPENDIX I.—AMERICAN SOCIETY OF TRAVEL AGENTS (ASTA) ECONOMIC WITNESS HEARING EXHIBIT; PAGES CONCERNING EFFECT OF NEW DISTRIBUTORS ON AGENTS' MARKET SHARE

TABLE III–1.—ESTIMATED PROPORTION OF DOMESTIC AIRLINE TICKETS SOLD BY TYPE OF DISTRIBUTION—BEFORE AND AFTER THE ABANDONMENT OF EXCLUSIVITY

Type of distribution	Percent sold within type with exclusivity	Percent of total	Percent sold within type without exclusivity	Percent of total
Total domestic sales		100		100
Travel agents:				
Nationwide agencies	7		7	
Agency coops	18		24	
Franchises	1		1	
Accredited banks	2		2	
Independent agents:				
Commercial specialists	18		14	
Full-line service	54		52	
Wholesalers/Tour operators [1]	[4]		[5]	
Bulk contractors [1]			[5]	
Total travel agents	100	53	100	51
Pure ticketing services:				
Ticketron	100		86	
All others [2]			14	
Total pure ticketers	100		100	2
Other ticketers:				
Business travel departments	63		68	
Government offices	32		24	
Nonprofit groups	5		8	
Total other ticketers	100	5	100	7
Airline offices:				
ATO/TBM	7		8	
CTO	86		85	
SATO	7		7	
Total airlines	100	42	100	40

[1] Figures in brackets not included in total to avoid double counting.

[2] This might include large retail chain stores and airline tickets by banks.

Source: Table I–2 and RRNA estimates.

TABLE III–2.—ESTIMATED DOLLAR AMOUNTS OF DOMESTIC AIRLINE TICKETS SOLD BY TYPE OF DISTRIBUTION—BEFORE AND AFTER THE ABANDONMENT OF EXCLUSIVITY

[In millions of dollars]

Type of distribution	Estimated dollar amount within type with exclusivity	Estimated dollar amount within type without exclusivity
Total domestic sales	18,666	18,666
Travel agents:		
Nationwide agencies	665	670
Agency coops	1,834	2,280
Franchises	80	100
Accredited banks	160	160
Independent agents:		
Commercial specialists	1,797	1,386
Full-line service	5,349	4,966
Wholesalers/Tour operators [1]	[375]	[475]

TABLE III-2.—ESTIMATED DOLLAR AMOUNTS OF DOMESTIC AIRLINE TICKETS SOLD BY TYPE OF DISTRIBUTION—BEFORE AND AFTER THE ABANDONMENT OF EXCLUSIVITY—Continued

[In millions of dollars]

Type of distribution	Estimated dollar amount within type with exclusivity	Estimated dollar amount within type without exclusivity
Bulk contractors [1]		[475]
Total travel agents	9,885	9,562
Pure ticketing services:		
Ticketron	11	300
All others [2]		50
Total pure ticketers	11	350
Other ticketers:		
Business travel departments	600	850
Government offices	300	300
Nonprofit groups	50	100
Total other ticketers	950	1,250
Airlines offices:		
ATO/TBM	662	600
CTO	6,658	6,404
SATO	500	500
Total airlines	7,820	7,504

[1] Figures in brackets not included in total to avoid double counting.

[2] This might include large retail chain stores and airline tickets by banks.

Source: Table I-2 and RRNA estimates.

Mr. HITCHCOCK. Thank you very much.

Senator KASSEBAUM. Let me say, Mr. Hitchcock is representing the aviation consumer action project.

Mr. HITCHCOCK. Thank you very much, Madam Chairman. It is a pleasure to be before the subcommittee this morning and I will try, in view of the hour, to keep my remarks even shorter than I had planned.

This bill is praised by its supporters as being proconsumer. In our view it is not. Instead of serving the broad interest of the traveling public, what it would serve is the narrow interest of the travel agents by giving them a permanent legal monopoly on selling tickets to the public for a commission. In effect, it amounts to an exemption from the antitrust laws.

Why is that bad? It limits competition and consumer choice. It stifles innovation, and what it does is set the current system in legislative concrete, regardless of how public needs may change in the future.

In making this statement, we are not somehow anti-travel agent. We believe, as we said in the testimony, that travel agents do a good job for their customers every day.

But our concern is more fundamental. What worked yesterday, what may be working today, may not work tomorrow. The airline industry is in a situation of transition, and that is why Congress should not be in the position of saying, this is the way it will be from now until we decide to change the law in the future.

I agree with the remarks that Mr. Baxter made in response to your last question of how do you find out what consumers want. The answer in retailing is often: Put it on the shelf and see what the customers will buy, whether it is acceptable or if it is not.

The problem with this bill is that it says, in effect, we are not going to allow others to enter into the industry, we are going to deny them the option of putting various things on the shelf, unless those already in the industry decide they might want to try a little innovation on their own.

What is objectionable about giving this industry a monopoly, I think, was indicated in a famous antitrust opinion a number of years ago, where the court said: What people with monopolies want is not high profits, but they want the quiet life. They want the peace of mind of not having to worry about innovations and messy competition and surprises coming from sources they do not expect—new entrants and new companies and having to do business in some way differently than the way things have always been done.

That I think is the real threat of this particular bill. What it does is it freezes in the status quo and tells travel agents: Do not worry about any sudden surprises, do not worry about somebody coming along and trying to take away business or trying to build a better mousetrap.

There are a couple of points I would like to make about the competitive marketing decision. A lot of the arguments deal with the accreditation, which I think is protected. It serves the public interest and so forth. What we are really talking about is exclusivity, drawing the lines and creating entry barriers.

I notice that the travel agent industry has a rather ambivalent attitude about antitrust. They like antitrust when it means there are no fixed commissions and they can run their prices up; they do not like antitrust when it means that you are going to reduce entry barriers and have the potential for new competition. Frankly, if you are going to have a competitive system you need both. You cannot have one without the other.

I would like to make one point about the CAB decision, and that is that it does not force anyone to do anything. What it does is it creates the option for new services and new innovations to come out if there is the perception that that is what the public wants.

Let us look at some of the things that are happening in terms of services to the public these days. Sears Roebuck is now selling stocks and bonds in their outlets. Various large drugstores are even having legal clinics being set up in the back.

If that is the case, if this is the way things are headed and that is what the public seemingly wants, it is hard to see why Congress should get involved in passing a law that says: No; airline tickets are somewhat unique. Sears Roebuck can sell you stocks and bonds and you can lose your fortune, but we are not going to let anybody other than authorized travel agents get into the travel agent business and sell airline tickets.

It just does not seem to make sense in that dichotomy. There ought to be greater freedom of entry.

Let me deal with some of the arguments about chaos and destruction and so forth that have come up. I think there are several answers. One is the point you made before, Madam Chairman, about how the system has been in effect for 10 months now and there have not really been any dramatic changes.

That is true, and these chaos arguments and destruction arguments have been made by just about every other industry that has faced exposure to the antitrust laws and new competition. Lawyers said that there is going to be chaos if they would not set prices together, if they had to advertise. Stockbrokers said there was going to be chaos if they could not fix commissions, and similar arguments have been made by some of the other industries that have been deregulated by this committee.

About the arguments on interlining, loss of universal interchangeability of tickets, difficulty of obtaining refunds, customer confusion, and other inconveniences—those were raised before this committee by the industry two years ago when you were considering the CAB early sunset provisions, and the argument was made that all of these benefits will disappear if tariff filing is abolished and the CAB no longer collects tariffs after January 1, 1983. Well, that was 9 months ago, and last time I looked there has not been a lot of chaos.

Two final points very quickly, if I may. One, another argument against chaos, I think, is that any changes, if they occur, will be gradual and will be phased in in light of the economic power and the dominance which travel agents now have in the industry. It will take a while before someone can get a toehold.

Second, there has been talk about the boycotts and the difficulties which airlines can have if one travel agent decides to plate away from one airline to another. I am not sure that system is particularly good for travelers. If I want to go to say Kansas City on a flight that leaves at 5 o'clock, I want to be put on the flight that leaves at 5 o'clock, not the flight that leaves at 6 o'clock on another airline because the travel agent does not like the airline that is leaving at 5 o'clock.

It is not good for the consumer to allow that kind of situation, where you can be unwittingly caught in the middle of a fight between airlines and agents over commissions and not get the kind of service that Mr. Santana talked about, where agents are serving all carriers and all members of the public on an equal, nondiscriminatory basis. It has to be one way or the other, and I think the threat of new competition will help assure that people will get the kind of service that they want and expect.

I thank you for your indulgence in letting me run over the time, and that concludes the statement.

[The statement follows:]

STATEMENT OF CORNISH F. HITCHCOCK, LEGAL DIRECTOR, AVIATION CONSUMER ACTION PROJECT

Chairman Kassebaum, Members of the Subcommittee: On behalf of the Aviation Consumer Action Project, I appreciate the invitation to testify today on S. 764, the Air Travelers Security Act of 1983.

ACAP is the only non-profit consumer organization working full-time on aviation issues. It is supported entirely by contributions from the public. Since its founding in 1971, ACAP has initiated and participated in numerous proceedings of concern to the travelling public before the Civil Aeronautics Board, the Federal Aviation Administration and other federal agencies. It has testified at the invitation of congressional committees on legislation affecting air travellers and was an active supporter of the Airline Deregulation Act of 1978. In addition, ACAP has published studies and reports in the aviation field and has provided assistance and adviced to tens of thousands of individual consumers over the past 12 years.

S. 764 is touted by its supporters as pro-consumer. It is not. Instead of serving the broad interest of the travelling public, it will only serve the special interest of travel agents, by giving them a permanent legal monopoly on selling tickets to the public for a commission, as well as an exemption from the antitrust laws. Such a result would limit competition and consumer choice. It would also stifle innovation by setting the current ticket distribution system in legislative concrete, regardless of how public needs may change in the future.

These comments should not be construed as somehow "anti-travel agent." There are many skilled, dedicated travel agents who give their customers the best service they can every day. We are confident that these agents will be able to adjust to any changing circumstances and will continue to do a good job for the public.

Our concern is more fundamental. The airline industry is in transition. What worked yesterday and what works today may not work tomorrow. As a result, Congress should not be passing a law which specifies that travel agents are the only outlet through which airlines can sell tickets. As the industry continues developing in a deregulated environment, as new technologies and alternative distribution system emerge, airlines should have the flexibility to serve the public in different ways than the traditional travel agent system.

Alternative distribution systems could produce various consumer benefits. One is convenience, for example, if people can buy tickets at retail outlets where they normally shop. These days, you can "buy your stocks where you buy you socks" at Sears, Roebuck, and legal clinics are opening their doors at large drug stores. If that is the case, and that is what the public apparently wants, then why should Congress be passing a law making it illegal for people to buy airline tickets at these outlets?

A second benefit would be price competition. Agent commissions account for ten percent of the price of a ticket, which is several points above pre-deregulation levels. If new outlets emerge, they may be able to sell tickets for less cost, which could help keep commissions—and air fares—in line. I would note that the CAB "deregulated" prices in this area when it abolished fixed commissions several years ago, to let commissions seek their own level in the marketplace. If the marketplace is going to work, it is also necessary to relax the entry barriers, as the Civil Aeronautics Board voted to do in December.

Since S. 764 is designed to prevent this situation from coming about and to overturn the CAB decision in the *Competitive Marketing Investigation*, a word about that decision would help put our comments in perspective.

The *Competitive Marketing Investigation* was a three-year examination of the present travel agency network, which was designed to determine if the present framework of regulation and antitrust immunity would best serve the public in light of the changes under deregulation. Under the present regulatory system, all major airlines belong to conference which jointly license travel agents and handle such technical matters as splitting fares among airlines, ticket stock security and so forth. In order to become a travel agent under this system—and thus be eligible to sell tickets on all airlines which belong to the conferences—an applicant must meet certain "accreditation" standards which are designed to assure that agents are competent, honest and financially stable. These conference agreements also contain so-called "exclusivity" clauses which require member airlines to sell their tickets exclusively through travel agents, and the CAB immunized these agreements from the antitrust laws for many years.

In its decision, the CAB approved the current accreditation system, which does help protect the public from dishonest or incompetent agents, and there is a good argument that such a common licensing system does not require antitrust immunity because it is perfectly legal, so long as it is not administered by the airlines in a discretionary or anti-competitive manner.

The same cannot be said about exclusivity, however, which the CAB disapproved and which S. 764 is designed to preserve. After extensive review of 40,000 pages of testimony and exhibits, the Board found that exclusivity is not needed to preserve a high level of service to the public and that airlines and travel agents should be required to comply with the antitrust laws, as are non-regulated industries. In order to assure an orderly transition, the Board removed antitrust immunity from exclusivity agreements concerning the sale of on-line tickets (i.e., tickets which an airline sells for its own flights, such as a Washington-Atlanta flight on Delta). The Board also voted to end immunity on 31 December 1984 for "joint-line" or "inter-line" tickets (i.e., a ticket between Pittsburgh and Atlanta, with the Pittsburgh-Washington leg on US Air and the Washington-Atlanta leg on Eastern).

By overturnng this decision, S. 764 would preserve the travel agents' current monopoly on selling tickets for the airlines. What this means, in effect, is that airlines would be forbidden to enter into agreements with a discount ticket outlet which, because of its lower costs and overhead, might be able to sell unrestricted, point-to-point fares for less cost to the public (e.g., a coach ticket between Chicago and St. Louis on TWA).

Allowing the CAB decision to take effect could produce results analogous to what happened after the Securities and Exchange Commission abolished fixed commissions for stockbrokers in 1975. People who simply wanted to place a specific stock could pay a lower commission by going to a discount broker than if they ordered through, say, Merrill Lynch, whose rates were higher because they included investment advice and other services.

In addition, it is possible in the future that other companies might want to sell a range of airline tickets to the public, including retail-store chains, banks, other financial services companies, not to mention the possibility of consumers using two-way personal computers tied to cable television systems at some time in the future. S. 764 would outlaw such possibilities, and travel agents could rest easy, knowing that a Montgomery Ward will not try to undercut their commissions or expand into their territory.

There is an important point to be made about the CAB decision. It does not require anybody to do anything. It does not require an airline to deal with Ticketron or Montgomery Ward or anybody else to sell its tickets. All it does is create the option for airlines to use such a system if they decide they want to. We do not know if or when particular airlines will move to an alternative distribution system, but it would be a mistake for Congress to legislate that such flexibility is illegal and that the status quo must be preserved until some unspecified time in the future.

In mounting the offensive against the possibility of new competition, travel agents have argued that the CAB's decision would create "chaos" and make it difficult, if not possible, for people to buy tickets with the same convenience they enjoy today. Let me make one general comment and two specific ones.

As a general proposition, similar "chaos" arguments were advanced by other indutries over the past decade when faced with proposals to increase competition and antitrust scrutiny. If there is one thing that experience has shown in this area, it is that such "chaos" arguments are usually overstated and that when change does come, the public usually benefits in the form of increased price competition and new service options.

As an illustration, when travel agents testified during the Subcommittee's "CAB early sunset" hearings in July 1981, they said that the public would be subjected to numerous problems if the CAB no longer collected airline tariffs after 1 January 1983, as mandated by the Airline Deregulation Act. There were dire predictions about difficulties developing interline fares, loss of universal interchangeability of tickets, difficulty obtaining refunds, customer confusion and other inconveniences similar to the arguments being advanced regarding S. 764. However, tariff filing did end on schedule, and none of these horribles resulted. In fact, one travel agent association spokesman was quoted in the January 3, 1983 edition of Travel Management Daily as saying, "We have told agents that we don't foresee any major changes" now that tariff filing had ended. So much for "chaos," and the present predictions should be evaluated in light of this recent experience.

There are two more specific reasons why implementation of the CAB decision is unlikely to be "chaotic." First, it is unlikely, as a practical matter, that there will be any sudden or disruptive changes in the current system. Second, when things do change, the public is likely to benefit. Let me explain.

Airlines presently rely on travel agents to sell 60 percent of their domestic and 80 percent of their international tickets, and thus agents have tremendous economic clout. This was shown in 1979 when United tried to lower agents' commissions for some tickets, only to have agents retaliate by booking customers on United's competitors. If an individual airline tried to make a deal with Ticketron or Montgomery Ward, for example, one might expect a similar reaction at least for the short term.

The presence of such raw power points up the need for potential new entry and competition so that consumers do not find themselves booked on a less convenient flight when they end up in the midst of an airline-agent feud. But is also demonstrates that agents have sufficient clout for the present time to assure that such changes are gradual and non-disruptive.

If and when airlines decide they want to experiment with alternative means of selling tickets, such a change is likely to benefit travelers by increasing their price and service options. No matter how well the current system may be working, Congress cannot say with certainty that it is the only method which airlines should be allowed to use, regardless of whatever new technologies and developments may come along in the future. Enacting legislation to freeze the status quo could thus stifle price competition and the possibility of future innovations, to the detriment of airlines and travelers alike. Thank you.

Senator KASSEBAUM. Thank you, Mr. Hitchcock.

Mr. Brown, vice president, Travel Agency Services, American Automobile Association.

Mr. BROWN. Madam Chairman, you have indeed been very, very patient this morning. AAA appreciates this opportunity to appear before you and I will be as brief as I can be.

The American Automobile Association is one of the largest travel agency organizations in the world. We serve over 23,400,000 members through a network of more than 1,000 offices, with over 750 accredited travel agency locations in the United States and Canada.

Madam Chairman, it would be appreciated if our more extensive statement could be placed in the record of this proceeding.

Senator KASSEBAUM. So ordered.

Mr. BROWN. AAA strongly supports S. 764, the Air Travellers Security Act.

Although AAA might very well be viewed as a major beneficiary of the collapse of the ATC and IATA travel agency programs, we feel that our responsibility to the traveling public and our members who make up a large portion of that public warrants our testimony here today. Therefore, we support the agency programs, we support their structure and the rules as they existed prior to December 29, 1982. We believe that that system has most effectively served the public's needs, desires and expectations, for four major reasons.

The first is agent impartiality and objectivity, and this means a great deal to the American Automobile Association because of its membership responsibilities in particular.

Second, a lack of consumer complaints against agent processing of air transportation.

Third, consumer protection from agency defaults.

And fourth and surely not to be considered least, consumer convenience.

I would like to depart, if I may, from my prepared remarks in the interest of brevity. There has been much discussion, Madam Chairman, this morning regarding protectionism of the travel agency industry. There has been discussion about the suppression of competition in the industry.

Agents do not seek protectionism. That has been my overwhelming experience in talking with our agents and others. If they did, let us look at the realities of life as it is today. As Mr. McKinnon puts it, "the realities" are these:

First of all, "exclusivity" is an improper word. It does not apply to the travel agency industry, nor does the word "monopoly." There are over 22,400 accredited travel agency locations in the United States. To be exact, 22,433 as of September 30. That in itself is a lot of competition.

There are more than 165 airlines which have their own multiple sales outlets throughout the world. Regrettably, I cannot give you the exact number of city ticket offices or airport ticket offices that are available to the public from which to purchase air transportation.

There are hundreds of business travel departments and other types of commercial firms which write their own tickets. There are thousands of methods of securing tickets, such as self-written tickets and other reservation procurement methods, all over the place.

Obviously, all of these methods of securing reservations, fares, and tickets through what probably will exceed, if the count were actually known, 35,000 locations—I am sure that the committee would be very hard-pressed to agree that the travel agency business is exclusive or represents some form of monopoly, especially if one looks at the availability of special fares under Economic Regulation 1246, which was adopted by the Civil Aeronautics Board on September 15, 1981. That in itself to commercial firms and to BTD's can be a source of compensation or a source of rebates, if you will.

Also, there is nothing to prevent an airline today in the United States from giving free air transportation to a traveler or any other beneficial service to anyone—individual travelers, corporate firms, or whatever the case may be.

On the subject of antitrust immunity, if I may again still depart from my prepared remarks, Madam Chairman, there is another factor which enters into the situation: ATC Resolution 1.40, which allows third party participation in ATC agency matters—and we also have an IATA joint council resolution that allows us as the third parties, to meet with the airlines and to thrash out changes and problems which exist in the travel agency business. We do not address other areas in these meetings. Without antitrust immunity, we would not sit down with our competitors in those highly valuable discussions which are held in the public interest.

And finally, I would like to draw to the chair's attention if I may—and Madam Chairman, you are undoubtedly well aware of this—the impeccable record, indeed the outstanding record of travel agents in serving the public. In March 1978, I received a letter from Chairman Kahn, then Chairman of the Civil Aeronautics Board, confirming that indeed the Board's Bureau of Consumer Complaints, or whatever it was called at the time and I can get that information if you wish would start breaking out travel agent complaints from those of other segments of the industry.

I would like to discuss with you the air travel complaint record for just 1982. I have it here for the entire period that records have been kept. In 1982 travel agents in the United States sold more than 21,800,000 dollars' worth of air transportation. They handled 125 million documents. At the end of 1982 there were 20,962 travel agent offices and, as someone mentioned this morning, 135,000 people that are engaged in this business. There were 151 carriers and there were 10,151 complaints. Of all those travel agents handling millions and millions of dollars and documents on behalf of the air transport industry and public there were only 113 complaints filed against the travel agency community in 1982 with the

Civil Aeronautics Board. The record is there for everyone to review.

This number of complaints 1.11 percent, of all of the complaints lodged with the Board. In looking at the last 4-year record, the picture is even better.

Madam Chairman, we would not want to see anything happen to destroy this kind of system which has been so clerly demonstrated to be in the public interest. AAA, will however, do all right with or without the agency programs. We are not likely to be greatly affected if they disappear.

But what will happen probably is that we will become a dealer or broker for certain airline and in the process we may well lose our long standing objectivity if we operate under that kind of system. So in the interest of our 23,400,000 members, we must plead with you to permit a common accreditation system to exist and take whatever action is necessary to move forward in the public interest.

Thank you very much, Madam Chairman.

[The statement follows:]

STATEMENT OF WILLARD R. BROWN, VICE PRESIDENT, TRAVEL AGENCY SERVICES, AMERICAN AUTOMBILE ASSOCIATION.

Madam Chairman, I am Willard R. Brown, Vice President of Travel Agency Services for the American Automobile Association.

AAA is one of the largest travel organizations in the world, serving its 23 million 400 thousand members through a network of more than 1,000 offices, with over 750 accredited travel agency locations.

AAA strongly supports S. 764, "The Air Travellers Security Act."

Although AAA might very well be viewed as a major beneficiary of the collapse of the ATC and IATA travel agency programs, we feel that our responsibility is to the traveling public and our members who make up a large portion of that public. Therefore, we support the agency programs, their structure, and the rules as they existed prior to December 29, 1982. We believe that that system has most effectively served the public's needs, desires, and expectations for at least four major reasons. It has ensured:

(1) Agent impartiality and objectivity;
(2) A lack of consumer complaints in agent processing of air transportation;
(3) Consumer protection from agency defaults; and
(4) Consumer convenience.

I would like to elaborate briefly on each of these points:

AGENT IMPARTIALITY AND OBJECTIVITY

Under the current system, once an agent meets certain minimum standards involving financial fitness, bonding, personnel, and experience, the agent is appointed automatically by the various airline members of the Air Traffic Conference of America and usually by the International Air Transport Association. The ATC and IATA comprise most of the world's scheduled airlines, consequently, the agent has the opportunity and responsibility to impartially represent all of these carriers. The accredited agent has no incentive to give biased information to the air traveler. An ATC appointed agent is able to provide a prospective passenger with the most objective and highest quality of information on fares, schedules, and types of service.

If after January 1, 1985, the current travel agency system begins to disintegrate and eventually evolves into a dealership or broker arrangement where travel agents would typically represent just a few airlines, objectivity would, without question, be seriously undermined and perhaps be lost forever.

In short, the public will be the big loser if the ATC agency program is seriously diluted or disappears altogether.

A LACK OF CONSUMER COMPLAINTS IN AGENT PROCESSING OF AIR TRANSPORTATION

The number of air travel complaints involving travel agents under the present system is remarkably low. For instance, according to official CAB reports for 1982 there were a total of 10,151 complaints; of those, only 113 (1.1%) were related to travel agents. In spite of the growing number of agency offices, the record is even better this year.

Out of 546 reservation and ticketing complaints in 1982, only 23 (4.2%) involved travel agents. Of 600 complaints on air fares, only 18 (3%) were attributable to travel agents. And concerning 1,084 refund complaints, only 31 (2.9%) related to agents. This is indeed a remarkable record since the over 21,000 accredited travel agents (the count now stands at nearly 22,500 and that's real competition) processed and issued 125 million documents on behalf of the scheduled airlines.

We believe this extraordinary record of service results at least in part from the fact that travel agents are required to meet minimal experience and financial standards before they are able to receive ATC accreditation. As I have just mentioned, the number of agency locations coming into the stream is increasing at a consistent rate of approximately 100 per month, so it is unquestionably apparent that the minimal entry and retention standards represent absolutely no bar to the professional and rapid growth of this industry which is so effectively serving and protecting the public interest. In short, travel agents, by the farthest stretch of imagination, do not represent a monopoly.

CONSUMER PROTECTION FROM AGENCY DEFAULTS

The public has historically been protected from travel agent insolvency with respect to the sale of scheduled air transportation. Indeed, to the best of our knowledge, throughout the entire 40-year history of the Air Traffic Conference agency program, no airline ever refused to honor a ticket which had been validly issued by an accredited travel agent, regardless of the financial condition of that agency.

CONSUMER CONVENIENCE

Much of what air passengers take for granted as part of their air travel package is facilitated by air carrier agreements. For instance, it is through the ATC Area Settlement Plan and Airline Clearing House that such passenger conveniences as interlining are facilitated.

Interline agreements allow travel agents to use one standard ticket form when ticketing a passenger on several carriers involving trips with an unlimited number of segments. The passenger therefore is spared the inconvenience of having to acquire a separate ticket for each leg of an interline journey regardless of how many stopovers or connections are involved. Furthermore, interline agreements on ticketing are the reason one airline will accept another airline's ticket. For instance, if a passenger misses a flight because of overbooking or a delay, he can take his ticket to another airline and obtain transportation whenever both lines have, as most do, a working agreement.

At least one airline, USAir, has publicly stated that "The ATC travel agency program is the glue that binds the interline system together." [1] USAir also went on to say that "Without antitrust immunity, there is a serious risk of eroding and possibly destroying, the worldwide interline air transportation system." [1] If USAir or any other airline acts on this belief and withdraws from the Air Traffic Conference, the interlining system and agency programs which have served the public so well will be in serious jeopardy and are very likely to collapse. We believe Congress should not allow that possibility to occur.

A moment ago I mentioned the experience and financial standards which are required under the ATC and IATA agency selection, appointment, and retention system. If your subcommittee, Madam Chairman, could review the changes in the ATC agency resolutions and the modifications which have occurred over the past decade to make them less anti-competitive and more effective in the public interest, and even more particularly, if it had been possible for you and your committee to be present at the various working group and task force meetings when these changes were developed, you would have additional and even more vivid evidence why there has been great merit behind the Civil Aeronautics Board's decision to grant the agreements in each individual case antitrust immunity. Without such shielding from the federal antitrust laws, Triple A and, I dare say, perhaps others would never have engaged in what were often adversarial discussions which resulted in a greatly improved service and a much finer product for the American public in air transportation.

---

[1] Transcript of Oral Arguments on CMI, September 16, 1982, page 94.

CONCLUSION

In sumamry, although AAA is likely not to be greatly affected by the demise of the ATC travel agency program, should it occur, we do strongly believe that maintenance of the current system will continue to bring substantial benefits to the consumer just as it has over the past forty years.

We therefore urge your committee, Madam Chairman, to favorably report the proposed legislation as soon as possible.

Thank you for allowing me to appear before you today to express AAA's views relative to the CAB's Competitive Marketing Investigation. I will be happy to try to respond to any questions which you may have at this time.

Senator **Kassebaum**. Thank you very much.

Mr. Brown, I might start with you since you finished last. You said that a monopoly does not apply to the industry. Well, if that is indeed the case, why should there be such concern about it not standing up under the scrutiny of the antitrust investigation if this immunity is lifted?

Mr. **Brown**. A monopoly, Madam Chairman, in our view, because of all of the sales outlets that exist today do not indicate that a monopoly applies. People can buy air transportation almost anywhere.

Our problem with it, with the lack of antitrust immunity, rests in two areas. One area is that—well, as it came out in oral arguments before the Civil Aeronautics Board on September 16, where U.S. Air said: "The ATC travel agency program is the glue that binds the interline system together. Without antitrust immunity, there is a serious risk of erosion possibly destroying the worldwide interline air transport system."

That is one area of major concern.

The other is we will not meet with the airlines and discuss and resolve problems that exist in various elements of the system. Without antitrust immunity over the agreements, we would be laying ourselves open, and we suspect the carriers would most particularly, to frivolous lawsuits all over the place.

So when we put those ingredients together, that is why we say that antitrust immunity should be granted on a selective basis for a transitionary period between a shifting of authority over the agreements from the CAB to whatever agency is to take such authority.

Senator **Kassebaum**. I guess I have a hard time understanding why you would not meet and why there would be all of these lawsuits. If it works to the advantage of the traveler and the carrier, why would you not meet?

Mr. **Brown**. Because currently we are meeting in joint sessions that are covered by antitrust immunity. I would not subject my organization to lawsuits when I sit down and discuss industry matters with airlines and other travel agents that are parties to the joint dialog sessions that exist today.

Senator **Kassebaum**. Why do you think there would be these lawsuits that would occur?

Mr. **Brown**. I think that they would be frivolous lawsuits. There may be certain prohibitions in the selection, appointment and retention rules in themselves which could be the subject of lawsuits without antitrust immunity.

Senator **Kassebaum**. Mr. Hitchcock, do you want to add to that?

Mr. **Hitchcock**. Yes, if I may comment on that, continuing the panel type discussion we had earlier. If I could draw a rough generalization about joint activities in antitrust, to try to reduce it to a one-sentence summary, the antitrust laws do allow joint operations as long as they are in a nondiscriminatory and not in an anticompetitive fashion. Once individual members the association does start acting in a discriminatory or anticompetitive fashion, that is when the antitrust laws come in.

I think that is a good balance which does accommodate the consumer interest, the industry interest, and the public interest of allowing basically useful cooperative ventures but not anticompetitive ventures. It is basically consistent with the approach in the PGA case you mentioned before. As long as you have objective criteria for who gets to play and who does not, that is fine.

Let us deal with the frivolous lawsuit question. Judge Yoder in his opinion expressly noted that there are presently frivolous lawsuits going on and cited several of them in the opinion. As far as frivolous lawsuits in the future, I am not sure how easy it is going to be for a bankrupt company to go out and find a lawyer to spend several years litigating an antitrust suit, faced with the exposure of having to pay for depositions and all of the costs which the other side has incurred if it wins.

And second, as I think Mr. DeMuth pointed out, let us suppose there are a couple of these lawsuits by disgruntled travel agents. You will get probably two or three opinions if it is pretty clear, as I think it is, that the conferences will be upheld. That will be a real disincentive for disgruntled travel agents or anybody else to say, "I lost my business, I'm going to go out and file an antitrust suit." There is considerable risk there and lawyers are probably unlikely to take them.

I think where it comes down is that the risks you have of frivolous lawsuits exist today, they are going to exist under a less regulated regime. They exist in other industries. If there is a problem of too many people bringing too many antitrust suits, I think it ought to be resolved on a systematic across-the-board basis, not just looking at one industry.

Senator **Kassebaum**. Let me ask you if you think that at this particular time in the industry and in the unstable conditions that are there right now, for whatever reason, is this a good time to press forward, with many believing that it will only add further to the problems that exist?

Mr. **Hitchcock**. Let me answer that in two parts, if I may. In the first place, as you pointed out, the decision has taken effect immediately back in December, when the industry and the economy were in much worse shape than they are now, and there has not been that disruption.

Second, I am not sure. My crystal ball is kind of cloudy as to what the economic situation is going to be like on January 1, 1985. I am not sure that there is one point in time or that our economic forecasters can predict when it is a good time as opposed to a bad time. I think if you do what the CAB did, which is give enough lead time so that the industry can plan and adjust, you deal with that.

Let me take that one step further, though, and address the question of what should Congress do about this question. I think an appropriate response which does balance all of the interests is to let the decision take effect and see what happens, have oversight hearings a year or two down the road, see if the predictions of destruction have appeared, see if the public seems to be suffering, and if at that point it might be appropriate to consider something.

The problem in this whole bill and this whole area is, after operating under a tight system for 40 years, no one really knows what the system is going to look like, if you move to the type of system allowed by the Board. And I think we come down on the side of let us try to experiment, see what happens there, rather than just closing the door and saying, no; we are going to legislate against changes of the sort the CAB thinks might work or might be implemented.

Senator KASSEBAUM. Mr. Brown.

Mr. BROWN. Madam Chairman, I would disagree with Mr. Hitchcock on that. In light of the present complaint record that stands alone, I submit it is pretty dangerous, frankly, to take a chance in some of these areas.

I feel very strongly that there is a great deal of risk involved. For example, there is an airline default protection plan that is out there at the moment. AAA elected to provide its travel agency customers with its own airline default protection plan. But it is tied to the airline default protection plan. Without antitrust immunity, we would have never gotten into discussions on the airline default protection plan and, I respectfully submit, it may never have come into being at all. So without those elements in existence—and again, I say—and I am undoubtedly quoting someone, I am sure—if its not broke, don't fix it.

And we have got a problem here. We look at the complaint record, the CAB's own complaint record. And I say this is a very dangerous risk to take, and again I am speaking on behalf of our 23.4 million members.

Senator KASSEBAUM. Ms. Macchia, I would like to ask you for a moment, because I might have misunderstood you. Did you say corporate discounts are nonexistent?

Ms. MACCHIA. That is true, Madam Chairman.

Senator KASSEBAUM. You do not have discounts for a certain types of package that you can put together?

Ms. MACCHIA. We get no special discount as a corporate account any more than a regular consumer on a one-on-one basis would get with the airline.

Mr. GAINES. Madam Chairman, if I could pick up on that a minute. We last year attempted to pursue that course of action with the airlines after we felt that there was an opportunity for ourselves and the airlines to find a reasonable meeting ground as deregulation unfolded.

We went to the individual major carriers and asked them to essentially treat the business travel departments as they would treat a travel agency. We were performing like services; therefore, we should see some sort of compensation package. We were probably leading them to talk about discounting per se.

In all instances we received an unfavorable response to our request. In our particular position, we felt we thought we probably had the best opportunity, an industry talking to a like industry, to obtain such discounting. And to my knowledge no major corporation, and perhaps no small corporation or company, has received discounts from the airlines.

Mr. STEIN. I think to amplify that, if I may, under phase 5 the airlines were permitted to negotiate a discount with corporations or business travel departments. To this day, to our knowledge not one airline has ever negotiated a discount arrangement, and therefore for the questioning to be why pay a commission on a discount is fallacious at the outset, because, if no discount has ever been offered and no discount has ever taken place, there is no probability of a commission being paid on top of a discount.

And a commission or a discount, whichever way you want to turn it, is merely a remuneration to the people who are doing the work of the airlines. They are actually doing the work and saving the cost to the airlines. And that type of remuneration is warranted.

I would like to address one other area if I may, in light of what I heard, as to the different types of marketing that may come into being in the event the CAB decision stays. I see nothing wrong with a broker buying a perishable seat and taking the risk away from the airline and selling it off to the marketplace at a discount.

If in the event he wants to come into being and purchase $100,000 worth of airline tickets from Chicago to New York and sell it to travelers from Chicago to New York for less money than anyone else, I believe that he has contributed to the marketplace, he is a competitive force, he is a cost-reduced situation, and it must inure to the benefit of the consumer.

So that is an area to be explored downstream, that will probably come into being—I am certain it will come into being—but has not yet been mentioned here, or not to the extent that I think it should be taken into consideration.

Senator KASSEBAUM. Well, I guess I misunderstood, because I assumed that one of the advantages of BTD was the fact that there was the opportunity to negotiate discounts as well as, of course, provide accessible planning for a large corporation that wanted to buy a number of tickets.

But I guess I would say why, for instance, should Lockheed be compensated for buying a block of tickets just because it is an advantage to purchase that way out of convenience to the corporation?

Mr. GAINES. We did not look at it in that same view. We looked at it as, we are performing a service for our employees, to make the travel arrangements, the reservations, the ticketing, the hotel, the car rental, many of those particular services which are identical to what a travel agency would perform.

We have, obviously, concerns about the cost of operating our business. We have the constant pressures—and we are particularly in the Government market—of trying to reduce our Government overhead rates. We have constant letters from various Defense officials berating us for not finding a solution to indeed lowering those rates.

When we have the opportunity as deregulation unfolds and affords us the opportunity, we should take advantage of that opportunity to reduce our rates, and that is exactly the position that we have taken. We feel that we can then pass back to the Government, pass back to the taxpayer, whatever lengthy chain you would like to refer back to, the opportunity to use those moneys elsewhere.

We would like nothing better to reduce our costs. It does in fact afford us one way of providing the taxpayer some benefit.

Senator **Kassebaum**. Well, I can certainly see that it would be of an advantage to Lockheed or any corporation in saving money for a business operation to sort through themselves the best travel plans that they can make at the least expense. So rather than necessarily feel—I guess I would question why there should be compensation for doing what would be a good business practice.

Mr. **Stein**. It is not that it is compensation as much as it is an ability to cut costs or be afforded the ability to cut costs. I think it goes, for instance, to the utilization by utility, where a utility predicates its selling price upon its costs. Now, if a gas company or a phone company or a telephone company or an electric company is in a position to reduce its costs and therefore pass on less of an increment or a lesser cost to his consumer, that is a benefit that he is being deprived of.

There are instances throughout industry and throughout business and throughout commerce where the reduction of costs of travel and airline expenses can be reduced. We need not be insulated by some travel agent in an in-plant deal where he does no work and gets compensated, or there is no need for us to go through a travel agent and have him paid 10 percent.

Every airline ticket carries a 10-percent cost on it, and there is no need for that if this work is done directly with BTD's. The ultimate consumer is paying 10 percent more on his airline ticket because of the existence of this system, and that 10 percent could be reduced. And if the costs are reduced it has to inure to the benefit of everyone.

And I do not know how clear that has been made, but that has been plugged in, and those people who do not use travel agencies or business travel departments who do their own work and do not need an agency are all suffering under this overhead, this burden, this excess charge.

Mr. **Gaines**. Madam Chairman, I would like to amplify a little bit on the reasons why we have found also that the concern for the airline industry—we were trying to look out for their welfare and their health and wellbeing themselves. If we felt that there was any way in there that we can reduce their costs, ultimately not only ourselves would benefit but the public at large. But we were looking principally at our own particular corporate needs.

We went to the airlines. We presented them a workback, if you will, of their financial statement to try to show them, based upon industry accepted figures, where they could save literally millions of dollars by engaging in a compensation package with the business accounts. Since our total revenue of the total industry is rather large, it would be in their best behalf to entertain any motion to reduce those costs.

There is a number of reasons, I believe, that they did not accept that position, and that is their prerogative, not to engage in it. They have the option whether they do or do not.

I think the timing was perhaps wrong. After 40 years of regulation, many of these airline executives and officials are reluctant to move into a new mode of innovation and imagination where business acumen replaces the Government overview. There is a concern on their part for not only their rivals, but the possible retaliation by the travel agents. The first carrier that breaks ranks is the carrier that is liable to suffer the retribution.

We received from them—we went to nine carriers. We received nine yes, they would be No. 2 to do it. Nobody will be No. 1 and there are reasons why and I think many of them have already been spoken to in previous testimony before you and I should not go on to repeat those.

So we did not receive the benefits of that, and we feel that perhaps we both are losing out.

Mr. **Brown**. One thing, if I may respond—and I will not burden you, Madam Chairman, with the economic picture. Mr. Phillips of ATA covered that fine in his response to Senator Goldwater.

But I think the committee should, and the Chair should, understand that the principal function of a travel agent is to generate business, to create business, and that of course is appearing in the volume of dollar record that is out there. The travel agent is compensated to increase the load factors on flights and thereby suppress fare increases.

Also, I have always had a problem understanding what BTD's are really after. If they are after money they can negotiate special tariffs, under E.R. 1246. And now, effective last December 31 tariffs and tariff rules are no longer filed. They can negotiate all the kinds of tariffs and tariff rules. If it is money, they can go to the airlines and they can use that approach. If it is beneficial services and that sort of thing, they can negotiate.

The outside and full service travel agent, under a common accreditation system is there to generate business, and the record of that generation speaks for itself.

Senator **Kassebaum**. Thank you very much.

Mr. **Bacon**. Could I respond to some of his statements, Madam Chair? He indicated that the travel agency industry was there to promote travel, and I guess I would ask this question: Why they accept the same 10 percent commission on travel they promote as well as the business travel that they handle and that they do not promote, that is going to go to the airlines and fly whether they use their travel agency or not?

I feel like the travel agency does a great service to the consumer and to the businesses that they handle. I do not think that there is any question in anybody's testimony here that indicated that the travel agency industry did not function under the system.

Still—and there has been some comments that the system does not necessarily say that the travel agency has to change.

Senator **Kassebaum**. Well, let me ask you, do you go through a travel agent or do you not normally make your reservations just through the business?

Mr. **Bacon**. Well, Tenneco is a large company. I speak strictly for it, whether there are other small companies that do different things. It is diversified enough that, where we have the concentration and we feel like we need the control or want the control over our personnel's travel, we indeed have a travel department. Where the concentration is not great enough and the business volume is small, they use the individual travel agency or they go to the airlines. They use whatever mode is most convenient for them, and I presume they will continue to do that.

Mr. **Brown**. Madam Chairman, in response to the gentleman that just commented, just recently there was a great deal of discussion about 3 percent commission versus 10 percent commission on in-plant operations. The American Automobile Association has a very large in-plant operation at one of its clubs in a very large commercial firm. And there was discussion going around about is 10 percent commission the right amount—some lines were paying 10 percent and some 3 and some said none at that point in time.

As we sat back and analyzed the situation, but did not voice this really publicly, this in-plant of ours said, given the choice between 10 percent and zero percent, we will take the zero percent but we prefer the 3 percent. And then on further interrogating that agent, he said, but we do not generate business there, we are merely handling business. We are order takers for that commercial firm and we are filling that role, and the 3 percent commission is adequate to do it.

Now, where we go out and generate business and spend money to do so, that's a different story—and I was interested in Mr. Hitchcock's comments about chaos has not existed. Well, obviously Mr. Hitchcock is not working in a travel agency today because it is sheer chaos.

But the point is that there is a reason why compensation is paid and there are reasons why levels are paid. But I do not want to argue this point with the BTD's. If they want to negotiate arrangements, fine. Who are we to stand in their way.

Thank you, Madam Chairman.

Senator **Kassebaum**. Thank you very much.

That concludes the hearing.

[Whereupon, the subcommittee was adjourned.]

ADDITIONAL ARTICLES, LETTERS, AND STATEMENTS

STATEMENT OF HON. CLAUDE D. PEPPER, U.S. REPRESENTATIVE FROM FLORIDA

Madame Chairman and Members of the Subcommittee:

I am especially pleased to have this opportunity to submit to you today my testimony in favor of the Air Travelers Security Act of 1983, S. 764, of which I am a cosponsor of the House version, H.R. 2053, and strongly supporting. Thank you for your usual kind and thorough consideration of this matter of great importance to my constituents in Miami, Florida.

Over the years, I have watched our air passenger travel industry evolve into what is probably one of the finest systems of its kind in the world. I am deeply concerned about the impact of the CAB Competitive Marketing decision on this system, because the way I understand that decision, the agreements providing for the sale and distribution of tickets through accredited travel agencies will lose their antitrust immunity at the end of 1984. If this is indeed the case, I do not see how the airlines and travel agencies can sit together to develop a set of common rules and standards to serve the travel consumer. Since no single carrier can possibly serve all destinations, it is imperative that the law permit all carriers to cooperate with one another without fear of federal antitrust laws hindering efficient service to the consumer without diminishing the present level of healthy price competiton.

I see no public benefit whatsoever in subjecting our air passenger system to federal antitrust laws since this would doubtless cause both consumer confusion and industry chaos. The result will be to complicate air travel, making it both more difficult and more costly for people to travel from place to place.

As you all know, I have particularly in mind the interests of our nation's senior citizens of whom I am one. An efficient air travel system is immeasurably important to this group, because the most meaningful experiences to many of its members are the trips which bring them together with children, grandchildren, and great-grandchildren who, because of our highly mobile society, often live great distances apart. I am against anything which will make this travel more difficult and expensive. Air travel is already complicated enough since airline deregulation, and it is because of our accredited travel agencies that many senior citizens are able to travel at all since agencies are the only reliable source of price and schedule information for all carriers. If, as is likely, CAB removal of antitrust immunity from the agency-carrier agreements subjects the industry to complex antitrust litigation and air travel, becomes more confusing as a result, then Congress has a responsibility to prevent this before it happens rather than afterwards. We simply cannot afford to trade something that works so well for something unknown.

I also believe Congress must assess the impact of the CAB decision on U.S. international air travel. As you all know, I come from an area of the country which is an important center for foreign visitors, almost all of whom arrive by air. Our current agency-carrier agreements enable them to arrive and depart with few problems and also enable people in the United States to make travel arrangements through any of the 22,000 accredited travel agencies here to go anywhere in the world. I understand that numerous foreign governments have objected to the CAB decision, and that if foreign airlines are subjected to antitrust litigation for continuation of the collective agency appointments system, there will probably be retaliation against our own carriers to the detriment of everyone who flies in U.S. international air travel. I see no purpose in this, and yet I can easily see it happening under the proposed changes to immunity.

I ask the Subcommittee to consider whether the system we have now functions well. I would suspect that the courts and antitrust bar will redesign the system with no assurance of improvement and great risk of a decline toward chaos following lengthy litigation which cannot possibly result in anything better than what we have now, an effective, efficient air travel system with open price competition.

I respectfully urge you to study the merits of this legislation, and thank you for your time in giving it all due and proper consideration.

STATEMENT OF HON. THOMAS A. LUKEN, U.S. REPRESENTATIVE FROM OHIO

Mr. Chairman and Members of the Subcommittee, I appreciate very much having the opportunity to share with you today my thoughts regarding government regulation of the travel agency system. As Chairman of the Subcommittee on Antitrust and Restraint of Trade Activities Affecting Small Business, I have had the opportunity to review the matters you have under consideration in some detail. Our Subcommittee has examined the marketing system for air transportation in the wake of the Civil Aeronautic Board's December, 1982 decision. On May 24 we held a hearing at which testimony was given by both government and public witnesses.

Most of the operating travel agencies today are classified as small businesses. This industry does provide opportunity for both minorities and women to break into the business world and compete for business. Over 46 percent of the agencies are owned by women today. Our Subcommittee looked into the air transportation marketing system because of our concern about potential damage to a small business success story.

As a Subcommittee Chairman with antitrust responsibilities I take a very careful look at proposed changes in the application of the nation's basic antitrust statutes. The potential for litigation is great, and the costs of such actions can be enormous.

Sections 412 and 414 of the Federal Aviation Act grant the CAB the authority to approve air conference agreements and provide immunity from antitrust laws. Our Subcommittee was particularly interested in reviewing the decision of the Board to deny immunity for conference agreements starting in 1985.

Some of the witnesses before our Subcommittee called the travel agency system a monopoly. Yet there is a great deal of growth in the industry. The CAB's own statistics show a 10 percent increase per year in the number of agencies during the decade of the seventies. There are now over 20,000 agency locations in the United States, and as I indicated before, opportunities for women and minorities are significant. Thus, the Agency system does not show the classic barriers to entry necessary to support charges of monopoly.

In our examination of the issue of competition, we found that almost all observers, including the CAB, agree that the agency system fosters competition within the airline industry by making easier entry for carriers. A new entrant would not have to make a large investment in a sales force if the people are already there through the agency system. Any expected benefit from the competitive marketing case must be weighed against the potential risk of losing this ready-made sales force.

The significant policy choice today for Congress is no longer between the air traffic agreements as they existed prior to December, and the decision of the CAB, but rather the choice is largely between Administrative Law Judge Yoder's findings and the CAB position. No party of which I am aware would ask at this time for a return to "exclusivity" as it was known prior to the CAB's actions on this matter. Under the Yoder decision, companies like Ticketron would be permitted to market airline tickets. This will provide competition in the industry in addition to the full service agencies. Congressman Anderson's bill, HR 2053, embodies that Administrative Law Judge's decision.

In judging whether to remove antitrust immunity from the Air Traffic Conference Programs then, the question really becomes one of weighing the potential advantages of the programs envisioned by the CAB as a result of the Board's decision, against the risk that the loss of antitrust immunity could threaten the agency system. In determining the advantages of ending antitrust immunity, it is essential to compare the system that would then emerge against the system that would exist under the Yoder decision.

Pressed to explain what benefits could be gained under the Board's decision, Chairman McKinnon could only cite "opportunity". He could not cite specific benefits that would not otherwise accrue under the Yoder Recommendations.

In fact, I cannot find evidence in the record that would demonstrate any significant benefits for the public in terms of price or service under the CAB order that would not also be available under Yoder.

In conclusion, I just don't believe that we ought to be trying to fix something that's not broken. All parties agree, with the possible exception of the business travel departments, that the current system works well to foster competition and serve the public. The loss of antitrust immunity could expose agencies and carriers to lawsuits which jeopardize continuation of the system. In order to justify taking that risk, I believe it is incumbent on us to demonstrate a significant public benefit. Until that benefit can be delineated, I remain convinced we should support a system that has served us well for more than 40 years. That's why I'm supporting Mr. Anderson's legislation.

STATEMENT OF JAMES D. SANTINI, WASHINGTON REPRESENTATIVE, NATIONAL TOUR ASSOCIATION

Madam Chairman and Members of the Committee: This statement is offered in support of the Travel and Tourism Government Affairs Council's endorsement of S. 764, the Air Travelers Security Act of 1983. NTA is proud to be one of the 28 national travel and tourism trade associations comprising the Council's membership. NTA has actively supported the Council's programs and initiatives, and wholeheartedly concurs with the Council's position on S. 764. NTA has prepared this statement for your distinguished panel to demonstrate its staunch support of this legislative initiative. It is NTA's judgment that S. 764 will protect not only the travel and tourism industry as a whole, but will also address NTA's particular concerns about the serious adverse impact the discussion rendered in the CAB's Competitive Marketing Investigation will have on NTA's members and clientele.

The National Tour Association is the primary tour industry in North America. NTA's membership represents over 375 tour operators who package and sell group vacations, as well as over 1,800 suppliers of travel services, such as hotels, restaurants, attractions, bus companies, sightseeing services, and other businesses. Each of these components making up our membership stands to experience serious adverse economic repercussions of the CAB marketing case decision.

NTA and every component of the travel and tourism industry will be affected by the implementation of any federal policy arising from the case. Your committee has already received voluminious documentation, in both oral and written forms, substantiating the tremendous impact of the travel and tourism industry on our nation's economy. It is not necessary to belabor these statistics now. It is sufficient to emphasize that by the year 2000, travel and tourism will rank as the top U.S. industry in terms of retail sales. Within the travel and tourism industry, the group tour business, which NTA represents, is the fastest-growing segment. The financial soundness of the entitities making up the NTA membership is inextricably linked to the financial soundness of the travel and tourism industry as a whole.

The existing travel agency system is a means by which the travel service providers gain immediate access to the public. Travel suppliers, including NTA members, rely on the agency system as an unbiased, common retail outlet for a full range of travel services: air, rail, boat, and rental car travel; motels, hotels, camping, and other lodging facilities; attractions, food services, and other travel-related services. Almost every major segment of the travel and tourism industry uses the travel agent for the sale of its services.

The existing travel agency system responds to the traveling public's need for professional traveling assistance. At the same time, the increase in the number of travel agents vouches for the competitiveness of the system. Every year, the travel agency business grows by approximately 10 percent.

Currently, travel agents play an important role in the marketing of group tours. Travel agents serve as a valuable link between NTA members and the travel consumer. Furthermore, NTA looks to the tremendous potential travel agents hold in the future for brokering group tours. In order for this increased role to become reality, however, public confidence in the travel agent must remain undisputed. The current system of travel agent certification ensures this. Should the vending of travel services be allowed to occur without the checks and balances of the current system, the group organizer will be unable to rely upon the travel vendor for credibility, accurate information, maximum dollar value, and equal treatment.

These characteristics of the services rendered to the traveling public under the current system are crucial to the NTA's clientele. The group is the fastest-growing segment of the travel and tourism industry today. It appeals especially to the senior citizen, the handicapped, the traveler seeking maxiumum value for his travel dollar, and the traveler seeking the security and reassurances of the group tour. It is precisely for this special clientele's benefit that NTA wishes to see the protections of the current system continued.

Of these specific markets, the senior citizen market makes up the lion's share of NTA's clientele. Americans aged 55 and over are perhaps the fastest-growing consumer segment today, and this market is expected to undergo a tremendous growth rate in the next 30 to 40 years.

The group tour operator must ensure that services most sought by senior citizens, i.e., convenient, worry-free, predictable travel, is delivered to them. NTA is committed to delivering this kind of service; otherwise, the senior market will opt to forgo travel.

The dramatic growth of the group tour segment also presents a potential for an increase in intermodal group tour packages. Two examples of this are a motorcoach group tour of New England's autumn foliage and country inns that depend upon air service to bring participants from southern or western areas of the United States and a motorcoach tour of a particular region of the United States designed for foreign visitors who arrive in our country by air. The prospect for a tour package that includes a flight combined with motorcoach travel is cogent justification of the need to maintain the current distribution system. Without unquestionable reliability and service, the growth of intermodal tour packages will be stymied.

The ATC agreement is an airline and travel industry self-regulation mechanism that maintains interline agreements for tickets and baggage handling. The motorcoach tour relies on interline agreements as an essential element of the consumer convenience that the public has come to expect over the last 40 years.

To illustrate the importance of this agreement to the motorcoach tour industry, consider the impact of any alterations of interline baggage handling agreements on senior citizens. Without the guarantees of the current system, senior citizens would be forced to deal with tracking baggage through changes in interline and intermodal situations. To the consumer who has chosen group, rather than self-organized, travel in order to avoid worries of this kind, the new system would undermine the advantage of group travel. The economic impact of seniors who forgo travel because of the prospects of baggage handling problems alone is reason to question the wisdom of ending a system that currently provides assurances to the traveler.

The distribution of travel services under the current system is efficient, cost-effective, and responsive to the consumer. This system has provided a reliable supplier of tourism services to the traveling public and a means for a travel service provider to gain immediate access to the public. NTA espouses the "if it is not broken, why fix it?" attitude. In our experience, the system has proven its merit. The changes that the CAB marketing decision will usher in are untested. These adjustments will affect NTA's segment of the travel and tourism industry adversely.

Thank you for this opportunity to present our views. NTA is committed to supporting S. 764 as a necessary, preventative measure against the serious threats this new environment poses to the consumer, the NTA membership, the entire travel and tourism industry, and ultimately, to the nation's economy.

STATEMENT OF GETTY OIL CO.

Getty Oil Company welcomes this opportunity to explain why we oppose the adoption of S. 764, the "Air Travelers' Security Act of 1983."

In December 1982, the Civil Aeronautics Board took an important step toward introducing competition into the marketing of airline tickets. It found that "exclusivity" agreements, which required airlines to use only Air Traffic Conference-accredited travel agents in the marketing and distribution of tickets for commission, could not be justified in the public interest. We agree with that finding. Allowing any business or group of businesses to have exclusive access to a market is anticompetitive by definition.

Experience has shown that competition will permit improved distribution and marketing systems to emerge. S. 764, on the other hand, would reinstate the monopoly of travel agents in ticket sales and distribution and restore the immunity from antitrust laws which they enjoyed prior to the CAB decision. This would amount to a legislative sanction for anticompetitive actions by the immune parties.

Getty is a major user of air travel. We have found it desirable to establish in-house travel offices which provide many of the same services as an outside travel agency, but with improved efficiency and convenience. If the CAB ruling is allowed to stand, we will be able to negotiate directly with airlines at a significant savings to the company. Many other organizations could also benefit from similar arrangements.

One of the most commonly heard arguments is the claim that small travel agents will be hurt by competition. Examination of the facts shows that the small travel agent will be virtually unaffected by the CAB decision since they do not handle the bulk of corporate airline ticketing. Business travel is concentrated in a relatively small number of large travel agencies and they are better equipped to efficiently adapt to the new competition. The travel agent industry group, ASTA, has itself predicted that competition from corporate in-house travel departments will cut agents' share of the ticketing market by only two percent, from 53 percent to 51 percent.

Ours is a nation built by competition and the freedom to innovate. We oppose efforts to restrict that freedom, and therefore, we oppose S. 764. We urge the members of the subcommittee to do the same.

STATEMENT OF AEROSPACE INDUSTRIES ASSOCIATION OF AMERICA, INC.

The Aerospace Industries Association of America, Inc. is the national trade association representing the major domestic firms engaged in the manufacture of aircraft, spacecraft, missiles and related components and equipment. The Association takes this opportunity to comment on a matter of significant importance to its members. They have expressed serious concerns over the provisions of S-764 to rescind the order of the Civil Aeronautics Board in the Competitive Marketing Case and establish by law continued anti-trust immunity for agreements between airlines and travel agents thus removing incentives for price competition in the airline industry.

In the normal conduct of business, members of the Association make extensive use of airline service and as such have a strong interest in promoting a most efficient and responsive system for the marketing of airline tickets and, for strengthening the carrier industry through the development of viable and competitive business arrangements. The Civil Aeronautics Board decision in the Competitive Marketing Case was supportive of these goals. The bill under consideration, S-764 is not and would serve only to re-regulate the marketing of airline services.

In the Board decision which would be reversed by enactment of S-764 there were essentially four major parts. (1) Exclusivity or the singular right for travel agents to market airline tickets was disapproved for travel on one carrier and on joint service or interline ticketing as of 31 December 1984. Airlines were allowed to enter bilateral or multilateral agreements on interlining. This permitted the airline to authorize other than accredited travel agents the opportunity to market tickets at competitive prices; (2) Basic accreditation standards for travel agents would remain and could be adjusted prior to the removal of anti-trust immunity in 1984; (3) Business Travel Department restrictions would continue until 31 December 1984 and (4) Anti-trust immunity conferred on today's travel agent agreement would continue for a transition period ending 31 December 1984. Thus, this decision removed barriers to the competitive marketing of air transportation tickets and provided a transition period for terminating the agreements containing "exclusivity clauses" requiring airlines to market their tickets exclusively through travel agents.

This decision which we support was consistent with the mandate of the Congress in the Airline De-regulation Act of 1978 (PL-95-504) which called for maximum reliance to be placed on competitive market forces to foster an efficient and well managed air carrier system. The bill S-764 would be inconsistent with this mandate and would reinstate regulatory barriers to competition which are unwarranted. The bill would convey under law, with no enabling provisions, continued anti-trust immun-

would convey under law, with no enabling provisions, continued anti-trust immunity

for travel agent agreements which serve only to inhibit competition in the martion which is consistent with the mandate of PL-95-504 and the Civil Aeronautics Board decision in the Competitive Marketing Case so that the benefits of competition can be maintained and extended to the users of airlines service and to the airlines themselves.

STATEMENT OF WILLIAM HULETT, PRESIDENT, STOUFFER HOTELS

My name is Bill Hulett, and I am President of Stouffer Hotels. We currently operate 22 hotels with approximately 10,000 rooms throughout the United States.

Stouffer Hotels strongly supports S. 764, the "Air Travelers Security Act of 1983."

Travel Agents are a prime reason for Stouffer's success and help us employ 6,000 people throughout the United States and for our continued growth.

Think of where the hotel industry would have been over the past five years without its vital partner—the Travel Agent. Hotel occupancies declined 7.2 percentage points between 1978 and 1982. During the similar five year period, industry data shows revenue for hotel and motels, generated by travel agents, increased from $1.0 billion level to well over $3.0 billion.

The percentage of our hotel business coming from travel agents' bookings has grown steadily every year, even when we experienced overall industry occupancy declines. That is because the agent, does not just process business, he or she creates it.

Our substantial investments in major hotels, such as The Mayflower here in Washington, and resorts such as our $60 million Palm Springs Resort currently under development, rely on the marketing professionalism and partnership Stouffer Hotels has strived for with travel agents. As a businessman I can tell you with 20 hotels, we have one of the broadest and most cost effective marketing networks through this nation's travel agents. And, I might add, 99% of whose businesses are classified as small local family businesses.

There is no other consumer-oriented industry which sells an intangible service (the promise of future transportation, a vacation experience, hotel, rent-a-car, etc.); to be consumed hundreds or thousands of miles from the purchase site; normally requiring payment in advance by the consumer to the travel agent; which then is transmitted to providers of each travel service. After the trip, agents provide consumers with the only sure and timely opportunity for obtaining refunds of unused services, and for fulfilling other consumer needs.

That this system continues to survive on telephoned requests, automated reservations, and other communications—in an industry that is 99% small business—is a credit to the standards of agency appointments, mutual confidence and respect for professionalism that have developed during the 40 plus years this system has evolved. If this system is not allowed to continue, our marketing costs would increase significantly, eroding our ability to reinvest profits for continued growth and expansion, and more importantly, creating new jobs at the local level. Many of these jobs are at entry level and have a considerable effect at reducing unemployment.

Yes, today's hotel industry depends on the 20,000 plus travel agents, our partners in bringing a wide range of services to the consuming public in a highly professional manner. The 17,000 plus members of ASTA (American Society of Travel Agents) and 3,400 plus members of ARTA (Association of Retail Travel Agents) plus others providing travel planning services in agent capacities represent a well functioning synergistic marketing system providing the public knowledgeable and factual information and services on the components of the travel industry—such as: air transport, hotels and resorts; rent-a-cars, and cruise ships

Can you imagine the chaos if this bill is not approved? A true Pandora's Box would swell with opportunistic individuals in an uncontrolled environment with the public as their potential victim. Travel, one of the nation's largest and fastest growing private industries, cannot afford the mass confusion that could result.

In summary, it is simple, we have in the travel agent, a valuable resource to our industry, bringing consumers to purchase our products in a cost efficient highly professional manner. For these reasons, Stouffer Hotels urges the passage of S. 764 the Air Travelers Security Act of 1983.